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A

PRACTICAL TREATISE

OF

The Law of Mortmain,

AND

CHARITABLE USES AND TRUSTS.

WITH

An Appendix

OF

STATUTES AND FORMS.

BY

LEONARD SHELFORD, ESQ.,

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

LONDON:

S. SWEET, CHANCERY LANE; & STEVENS & SONS, BELL YARD;
Law Booksellers and Publishers:
AND MILLIKEN & SON, GRAFTON STREET, DUBLIN.

MDCCCXXXVI.

STEVENS AND PARDON, PRINTERS, BELL YARD, TEMPLE BAR.

PREFACE.

The numerous Charities existing in this country—the inquiries already completed and in progress respecting them —the number of decisions already made and likely hereafter to arise in courts of equity upon difficult and intricate questions concerning Charities—and the want of a modern and more systematic arrangement of the law upon that subject than has hitherto appeared, are sufficient reasons for offering to the Profession and the Public a new work upon it.

The author, at the expense of much labour, has endeavoured, by a careful perusal of the reported cases, and in many instances by the examination of other authentic documents, to collect all the material points upon the law of Mortmain and Charities, and to arrange them in such order as to afford facility of reference and elucidation of principles. In traversing so wide a field, under circumstances neither encouraging nor favourable to the performance of a task not free from difficulties, it is rather to be desired than expected that every point worthy of notice should have received its appropriate consideration.

The abstract principles relating to Charities might be brought within a small compass compared with the extent

of this work. In answer to an objection which may be made to its length, it may be observed, that the statement of facts has in many instances been deemed necessary for rendering the subject intelligible and the work practically useful. It would be difficult to refer many of the decisions respecting Charities to any well-defined principle, and the distinctions between others depend frequently on such minute variations of circumstances as to induce the alternative of either omitting the case, or of stating the leading facts at some length.

A more enlarged experience, and a more continuous and uninterrupted attention, may no doubt correct some faults and supply some deficiencies in this work; amplify some parts of it, and curtail others; but some hope is entertained that the book, in its present state, will supply those who are imperfectly acquainted with this branch of law, with facilities for acquiring a knowledge of it, and tend materially to shorten their labours in the future pursuit of it. In apology for any defects in the performance of his design, the author has to state, that it has been his anxious wish and aim to render the work as useful and complete as the opportunities afforded him and his other engagements would admit.

3, Brick Court, Temple,
Easter Term, 1836.

CONTENTS.

CHAPTER I.

OF THE STATUTES RESTRAINING ALIENATIONS IN MORTMAIN, AND OF THE DISPENSATION WITH SUCH STATUTES.

Page.

SECTION I. *Of the statutes restraining alienations in mortmain* 1

II. *Of the different kinds of corporations* . . 21

III. *Of licenses to hold lands in mortmain* . . 34

1. *How such licenses were formerly granted, and when necessary* . . . . . *ib.*

2. *The present power of the crown to grant such licenses* 39

IV. *Of the dispensation with the statutes of mortmain in favour of particular corporations* . 42

1. *Foundation of hospitals* . . . . *ib.*

2. *Workhouses* 49

3. *Augmentation of small livings* . . 51

4. *Parsonage houses* 52

5. *Building of new churches* . . . 53

6. *Corporations* 55

CHAPTER II.

OF CHARITABLE AND SUPERSTITIOUS USES AND TRUSTS.

SECTION I. *Of uses and trusts which are charitable* . . 58

1. *General observations on the term charity* *ib.*

2. *Gifts to the poor* 61

3. ——— *poor relations* . . . 63

Page.

4. *Gifts for the advancement of learning* . 68
5. ——————————— *religion* . 71
6. *Gifts for general and public purposes* . . 75

SECTION II. *Of uses and trusts not charitable* . . . 82

III. *Of superstitious uses and trusts* . . . 88

1. *Definition of superstitious uses* . . 88
2. *Statute of* 1 *Edw. VI. c.* 14, *and construction thereof* 93
3. *Protestant dissenters* 100
4. *Jews* 105
5. *Unitarians* 108
6. *Roman Catholics* 109

CHAPTER III.

OF THE STATUTE 9 GEO. II. C. 36, RESTRAINING THE DISPOSITION OF LANDS TO CHARITABLE USES.

SECTION I. *Of the general object of the statute* 9 *Geo. II. c.* 36 117

II. *Of conveyances and purchases within the* 9 *Geo. II. c.* 36 123

1. *Copyholds are within the act* . . . *ib.*
2. *Of reservations to the grantor* . . . 124
3. *Of inrolment of the conveyance* . . . 129
4. *Of purchases within the second section of the act* 131

III. *Of devises and bequests within the statute* 9 *Geo. II. c.* 36 138

1. *Of wills executed before the act by testators who died after* . . . . . *ib.*
2. *Of words which will create a trust* . . 141
3. *Of honorary and secret trusts* . . . 144
4. *Of bequests of leaseholds* . . . 154
5. *Of bequests of money due on mortgages, tolls, poor rates, and county rates* . . . *ib.*
6. *Money given to exonerate lands in mortmain* . 161
7. *Money charged on real estate* . . 163
8. *Money to arise by sale of real estate* . . 164

Page.

SECTION IV. *Of bequests of money to be laid out in the purchase or improvement of real estate for charitable uses* 168

1. *Of imperative trusts to invest in lands* . *ib.*
2. *How far a testator's intention may be effected by hiring land, or by a gift from others* . 178
3. *When a discretionary power to invest in lands or in the funds will support the gift, and when not* 183
4. *When bequests to improve lands in mortmain are valid, and when not* 188

V. *Of bequests of personalty which fail on account of being connected with a devise of real estate* 195

VI. *Of the right of heirs at law, devisees and next of kin of testators, to the benefit of void devises and bequests to charitable uses* . . 204

1. *When the heir at law is entitled to void charges* 206
2. *When devisees are entitled to void charges* . 209
3. *Questions between real and personal representatives in cases of conversion of real estate* 214
4. *Release from next of kin not presumed* . 225

VII. *Assets not marshalled in favour of charities* . 227

1. *Decisions as to marshalling assets in cases of charities* 228
2. *As to the apportionment of a mixed fund for the payment of debts and charitable and other legacies* 234

VIII. *Of exemptions from the statute* 9 *Geo. II. c.* 36 240

1. *Annuities* 241
2. *Exception in favour of English universities and colleges* 244
3. *Queen Anne's bounty* 255
4. *Hospitals* . . . . . *ib.*
5. *Devises by freemen according to the custom of London* 257
6. *Gifts of real and personal estates in Scotland* *ib.*
7. ——— *in Ireland* . 262
8. ——— *in the West Indies* 263

CHAPTER IV.

OF THE JURISDICTION RESPECTING CHARITABLE USES AND TRUSTS.

Page.

SECTION I. *Of the prerogative of the crown* 267
1. *Of the right of the crown as parens patriæ* *ib.*
2. *Of the disposition of charitable funds by the king's sign manual* 269
II. *Of the commission of charitable uses* . . 276
1. *Of the inquiry by commission* . . . . *ib.*
2. *Who may be commissioners* 280
3. *Of the inquisition* 281
4. *Of the decree of the commissioners of charitable uses* 283
5. *Of exemptions from the statute of charitable uses* 292
III. *Of the commissioners appointed for making inquiries concerning charities* . . . 300
IV. *Of the visitation of charities* 322
1. *Of the nature and origin of visitatorial power* *ib.*
2. *Of visitation in right of the crown* . . 332
3. *Of the appointment of special visitors* . 343
4. *Of the powers of visitors* 360
5. *Of interference by mandamus in cases of eleemosynary foundations* 380
SECTION V. *Of proceedings by information* 398
1. *Of the attorney general acting on behalf of the crown in charities* . . . . . *ib.*
2. *When the court of chancery has no jurisdiction* 408
3. *When the attorney general is a necessary party* 411
4. *Protestant dissenters may proceed by information—when and when not* 415
5. *Of informations respecting funds applicable to public purposes* 420
6. *Of the relator* 424
7. *The attorney general may proceed without a relator* 428
8. *Of parties to informations* 430

Page.

9. *Directions for establishing charities will be given notwithstanding informality in information* 444
10. *Plea—demurrer—multifariousness* . . 446
11. *Of the accounts which will be directed of charity estates* 455
12. *Of costs relative to charities* . . . 467

SECTION VI. *Of proceedings by petition* 481
1. *Of petitions under 52 Geo. III. c.* 101 . . *ib.*
2. *Of petitions in the name of the attorney general* 497
3. *Of petitions for the appointment of trustees* . 498
4. *Of petitions under private acts of parliament* 508

CHAPTER V.

OF THE CONSTRUCTION OF GIFTS TO CHARITIES, AND THE ADMINISTRATION OF THE FUNDS.

SECTION I. *Favourable construction of charitable gifts* . 512
1. *Legacies to charities favoured in the civil law* 513
2. *Defective assurances in favour of charities aided in equity* 514
3. *A perpetuity may be created without words of inheritance* 517
4. *Cases where neither trustees nor objects are named, but there is a reference to a future appointment not made* 518
5. *Cases where no trustees are named, but there is a reference to a class of objects without naming any individuals* 523
6. *Cases of bequests to trustees for such charitable purposes as they in their discretion shall appoint where objects are or are not named* . 524
7. *Cases of failure of trustees, and of persons to select objects arising ex post facto* . . 530

II. *Cases where charities are entitled to the whole income of estates, or to fixed payments only* 538
1. *Where the whole rents are devoted to charity* *ib.*

Page.

2. *Usage admitted in construing charitable gifts* 562
3. *Where the donee of the fund is entitled to the surplus rents, subject to fixed payments* . 567
4. *Of the acceptance of estates given in trust for charities* 597

SECTION III. *Of the doctrine of cy-pres or approximation to the donor's intention* 601

1. *Where the particular objects named have failed or cannot take* . . . . . *ib.*
2. *Where the fund is more than sufficient for the objects specified* 613
3. *Of the application of the doctrine of cy-pres to the regulation of grammar schools* . . 629
4. *When the doctrine of cy-pres will not be applied* 648
5. *Of the settlement of a scheme for the application of charitable funds* 651
6. *Of the apportionment of charitable funds* . 656

IV. *Of bequests to charity void for uncertainty* . 662

CHAPTER VI.

OF THE ALIENATION OF ESTATES BELONGING TO CORPORATIONS AND CHARITIES.

SECTION I. *Of the alienation of estates belonging to municipal corporations* 672

II. *Of the alienation of estates belonging to eleemosynary corporations* 680

III. *Of the alienation of estates belonging to charities* 687

1. *Of sales and leases which have been held valid* *ib.*
2. *Of leases which have been set aside* . . 697
3. *Of particular directions by the founder as to leases* 704
4. *How far underleases will be affected where the original leases are declared to be void* 705
5. *Of persons incapable of taking leases of charity estates* 707
6. *Power of leasing lands given for the maintenance of highways* 708

Page.

7. *Miscellaneous points relating to tenants of charity estates* 709
8. *Of the alienation of rights of patronage* . 713

CHAPTER VII.

OF THE APPOINTMENT AND REMOVAL OF PERSONS CONNECTED WITH ELEEMOSYNARY FOUNDATIONS AND CHARITIES.

SECTION I. *Of college elections* 717
II. *Of the election of curates and chaplains by inhabitants* 721
III. *Of the appointment and removal of schoolmasters* 725
IV. *Of the appointment and removal of trustees generally* 735
V. *Of the appointment and removal of ministers and trustees of dissenters' establishments* . . 742
1. *Deviation from the intention of the founder will not be allowed* . . . . . *ib.*
2. *Of the election and removal of dissenting ministers* 762
3. *Of the appointment and removal of trustees* . 766
VI. *Of the nomination of objects by trustees* . 768

CHAPTER VIII.

OF THE LIABILITY TO, AND EXEMPTION FROM, THE PAYMENT OF TAXES IN RESPECT OF CHARITIES.

SECTION I. *Of the liability of charitable bequests to the payment of legacy duty* 773
II. *When indentures of apprenticeship are or are not exempt from stamp duty, and what is not a public parochial fund* 778
III. *When charitable institutions are or are not exempt from poor and church rates* 783
IV. *Of the provisions respecting charities in the statutes relating to the land tax* 790

CHAPTER IX.

OF THE RIGHT OF VOTING FOR MEMBERS OF PARLIAMENT IN RESPECT OF CHARITIES, AND HOW FAR THE RECEIPT OF ALMS OR CHARITY IS A DISQUALIFICATION.

Page.

1. *Of schoolmasters' right of voting* 798
2. *Dissenting ministers generally disqualified to vote* . 800
3. *When the receipt of alms or charity is or is not a disqualification* 802
4. *Receipt of alms or charity a disqualification under the act for regulating municipal corporations* . . 807

APPENDIX.

PART I.

THE STATUTES RELATING TO MORTMAIN AND CHARITABLE USES.

Page.

MAGNA CHARTA, 9 HENRY III. c. 36, A. D. 1224-5.—*No land shall be given in mortmain* 809

THE STATUTE DE RELIGIOSIS, 7 EDWARD I. st. 2, c. 1, 15th Nov. A. D. 1279.—*Who shall take the forfeiture of lands given in mortmain* . . . . . *ib.*

STATUTE OF WESTMINSTER THE SECOND, 13 EDWARD I. st. 1, c. 32, A. D. 1285.—*Remedy in case of mortmain by recovery of land by default* 810

13 EDWARD I. st. 1, c. 33.—*Lands where crosses be set, shall be forfeited as lands aliened in mortmain* 811

34 EDWARD I. st. 3, A. D. 1306.—*That lands shall not be aliened in mortmain, where there be mesnes, without their consent* . . . . . *ib.*

18 EDWARD III. st. 3, c. 3, A. D. 1344.—*Prelates impeached for purchasing lands in mortmain* 812

15 RICHARD II. c. 5, A. D. 1391.—*For explaining and amending the statute of mortmain, 7 Edw. I. st. 2* 812

23 HENRY VIII. c. 10, A. D. 1531-2.—*An act for feoffments and assurances of lands and tenements made to the use of any parish church, chapel, or such like* 813

STATUTE OF CHARITABLE USES, 43 ELIZABETH, c. 4, A. D. 1601.—*An act to redress the misemployment of lands, goods, and stocks of money heretofore given to certain charitable uses* 815

Page.

MONEY GIVEN FOR BINDING OUT POOR APPRENTICES, 7 JAMES I. c. 3, A. D. 1609.—*An act for the continuing and better maintenance of husbandry and other manual occupations, by the true employment of monies given and to be given for the binding out of apprentices* . . . 819

INQUIRY AS TO CHARITIES FOR THE BENEFIT OF POOR PRISONERS, 22 & 23 CHARLES II. c. 20, st. 11, A. D. 1670 . 824

7 & 8 WILLIAM III. c. 37, A. D. 1796.—*An act for the encouragement of charitable gifts and dispositions* . . . *ib.*

STATUTE RESTRAINING GIFTS TO CHARITABLE USES, 9 GEORGE II. c. 36, A. D. 1736.—*An act to restrain the dispositions of lands whereby the same become unalienable* . 825

LYING-IN HOSPITALS, 13 GEORGE III. c. 82, A. D. 1773.—*An act for the better regulation of lying-in hospitals and other places appropriated for the charitable reception of pregnant women; and also to provide for the settlement of bastard children born in such hospitals and places* . . . 827

GIFTS TO QUEEN ANNE'S BOUNTY, 43 GEORGE III. c. 107, 27 July, 1803.—*An act for effectuating certain parts of an act, passed in the 2nd and 3rd years of the reign of her late majesty Queen Anne, intituled, "An act for the making more effectual her majesty's gracious intentions for the augmentation of the maintenance of the poor clergy, by enabling her majesty to grant, in perpetuity, the revenues of the first fruits and tenths; and also for enabling any other persons to make grants for the same purpose, so far as the same relate to deeds and wills made for granting and bequeathing lands, tenements, hereditaments, goods and chattels to the governors of the bounty of Queen Anne, for the purposes in the said act mentioned, and for enlarging the powers of the said governors* 830

BUILDING OF NEW CHURCHES, 43 GEORGE III. c. 108, 27 July, 1803.—*An act to promote the building, repairing, or otherwise providing of churches and chapels, and of houses for the residence of ministers, and the providing of churchyards and glebes* 832

QUEEN ANNE'S BOUNTY, 45 GEORGE III. c. 84, 2 July, 1805. *An act for making more effectual the gracious intentions of her late majesty Queen Anne, for the augmentation of the maintenance of the poor clergy, so far as relates to the returns of certificates into the exchequer, and gifts of personal property* 835

Page.

GIFTS TO COLLEGES IN THE TWO UNIVERSITIES, 45 GEORGE III. c. 101, 10th July, 1805.—*An act to repeal so much of an act, passed in the ninth year of the reign of his late majesty king George the second, intituled, 'An act to restrain the disposition of lands, whereby the same become unalienable,' as restrains colleges within the two universities of Oxford and Cambridge from purchasing or holding advowsons, except as therein is provided* 838

BUILDING OF CHURCHES, CHAPELS, AND PARSONAGE HOUSES, 51 GEORGE III. c. 115, 26th June, 1811.—*An act for amending the act of the* 43 *Geo. III. to promote the building, repairing or otherwise providing the churches and chapels, and of houses for the residence of ministers, and the providing of church-yards and glebes* 839

REMEDY FOR ABUSES OF CHARITABLE TRUSTS, 52 GEORGE III. c. 101, 9 July, 1812.—*An act to provide a summary remedy in cases of abuses of trusts created for charitable purposes* 841

REGISTRATION OF CHARITABLE DONATIONS, 52 GEORGE III. c. 102, 9 July, 1812.—*An act for the registering and securing of charitable donations* 842

APPLICATIONS TO COURTS OF EQUITY RESPECTING CHARITIES, 59 GEORGE III. c. 91, 12th July, 1819.—*An act for giving additional facilities in applications to courts of equity, regarding the management of estates or funds belonging to charities* 848

EXCHANGE OF CHARITY ESTATES, 1 & 2 GEORGE IV. c. 92, 10th July, 1821.—*An act to authorise the exchange of lands, tenements or hereditaments, subject to trusts for charitable purposes, for other lands, tenements or hereditaments* 850

ACT FOR REMEDYING DEFECTS IN ASSURANCES TO CHARITABLE USES, 9 GEORGE IV. c. 85, 25th July, 1828—.*An act for remedying a defect in the titles of lands purchased for charitable purposes* 858

AUGMENTATION OF SMALL LIVINGS, 1 & 2 WILLIAM IV. c. 45, 15th October, 1831.—*An act to extend the provisions of an act passed in the 29th year of the reign of his Majesty King Charles the Second, intituled an act for confirming and perpetuating augmentations made by ecclesiastical persons to small vicarages and curacies, and for other purposes* 860

Page.

APPLICATION TO COURTS OF EQUITY RESPECTING THE FUNDS AND TRUSTEES OF CHARITIES, 2 WILLIAM IV. c. 57, 23rd June, 1832.—*An act to continue and extend the provisions of an act passed in the 59th year of his Majesty King George the Third, for giving additional facilities in applications to courts of equity regarding the management of estates or funds belonging to charities; and for making certain provisions respecting estates or funds belonging to charities* 872

CHARITABLE GIFTS IN FAVOUR OF ROMAN CATHOLICS, 2 & 3 WILLIAM IV. c. 115, 15th August, 1832.—*An act for the better securing the charitable donations and bequests of his Majesty's subjects in Great Britain professing the Roman Catholic religion* 875

UNIVERSITY LIFE ASSURANCE SOCIETY, 5 & 6 WILLIAM IV. c. 4, 13th April, 1835.—*An act to enable the University Life Assurance Society and their successors to purchase annuities upon or for lives, and also to lend money or stock upon mortgage for the purpose of investment* 877

ACT FOR APPOINTING COMMISSIONERS TO INQUIRE CONCERNING CHARITIES, 5 & 6 WILLIAM IV. c. 17, 9th September, 1835.—*An act for appointing commissioners to continue the inquiries concerning charities in England and Wales until the first day of March,* 1837 879

TABLE OF STATUTES RELATING EXCLUSIVELY TO CHARITIES IN IRELAND 889

PART II.

FORMS AND PRECEDENTS.

Form of License in Mortmain granted to a College in Oxford 891

FORMS OF INFORMATIONS RESPECTING CHARITIES.

INFORMATION *for the Removal of the Master of a School, for the Appointment of Trustees for the Management of the School Property, and for the Settlement of a Scheme* 892

Page

INFORMATION *filed at the instance of the Charity Commissioners for setting aside a Reversionary Lease of a Charity Estate for* 500 *Years, and for an Account of the Rents and Profits beyond the Rent Reserved* 900

SOME STATEMENTS *and Charges in, and Prayer of an Information for the Establishment of a Charity for the Poor of a Parish, and for the due Administration of the Funds thereof, and for setting aside a Lease, and for an Injunction to restrain the Trustees from granting Leases on Fines of other parts of the Charity Property* 903

PRAYER *of an Information to reform Abuses in the Management of the Charity Property, for removing Trustees, and for the Settlement of a Scheme* 906

STATEMENTS *and Charges in, and Prayer of Information against the Select Vestrymen, Parish Officers, and Feoffees of a Parish, for the Establishment of several Charities, and Decision on the Claims of such Charities to certain Property which had been purchased with Charitable Bequests, for an Account of Fines, and for a Scheme for the Application of the Rents and Profits* . . . . . *ib.*

INFORMATION *for the Recovery of a Rent Charge against the Owners of the Lands charged therewith, and the Trustees to whom the Distribution of it was given* 910

INFORMATION *against a Corporation and the Master and Usher of a Free Grammar School for Recovery of Property belonging to the School in the Possession of the Corporation, for an Account of Rents and Profits,—of the Purchase Money of Lands sold,—for a Scheme for the Application of Rents and Regulation of the School, with other Accounts and Inquiries.* 916

CHARGES *and Prayer of an Information filed against a Corporation for correcting the Misapplication of various Charities founded by Ten Benefactors, and for putting the Charities on a proper footing* 926

STATEMENTS, *Charges, and Prayer in an Information at the relation of a Freeman of a Company on behalf of himself and the other Freemen of a Company, and of an Inhabitant of a City Ward, against a Company for Accounts of the Rents of Estates given by three Testators to the Company for different Charitable Purposes, and for the settlement of Schemes adapted to the intention in each Will* . 932

FORMS OF ANSWERS TO INFORMATIONS.

Page.

ANSWER *to an Information filed by the Attorney General against a Company for the purpose of establishing the right of the Charity to the whole Rents of the Estate* . . . 939

ANSWER *of the Attorney General to a Bill which concerned a Charity* 943

INTERROGATORIES *for the examination of Defendants under a Decree as to Estates* 944

FORMS OF PETITIONS.

PETITION *to the King as Visitor of a College* 947

PETITION *for the Appointment of Trustees of Charity Estates and for vesting the same in them, and for a Scheme for the regulation of the Charity* 949

PETITION *to confirm the Master's Report, made in pursuance of the Order obtained on the preceding Petition, and for Taxation and Payment of Costs* 950

PETITION *for an Account of Dividends received by the Secretary of a Charity, for the Appointment of a Schoolmaster, and for the Settlement of a Scheme* 953

FORMS OF SCHEMES FOR THE FUTURE REGULATION OF CHARITIES.

SCHEME *for the future Regulation and Management of the Charity founded by Henry Alnutt, Esq. and the Estates and Funds belonging thereto, and for the future Application of the Income of the said Charity* 956

SCHEME *for the Regulation of a School* 966

DIRECTIONS *in the Scheme of a Grammar-school* 970

DIRECTIONS *in a Scheme as to Exhibitions for Two Boys to to be sent from a Grammar-school to either of the two Universities* 971

SCHEME *for the application of a Sum of Stock given by Will, dated April*, 1791, *for the support of a School* 972

Page.

SCHEME *for the application of several Bequests given to a Company to be advanced as Loans without Interest to Men free of such Company* 974

SCHEME *for the Distribution of a Charity given for the better Relief of the aged and needy Poor People of a Parish, to be distributed at Christmas and Easter, as the Vicar, Churchwardens and Vestrymen should think fit* . 976

SCHEME *for the Application Cy-pres of Funds which had originally been given for the Redemption of Slaves* . . 977

CONVEYANCE *of Lands and Rent-Charges by Old Trustees to New Trustees in pursuance of a Decree of the Court of Chancery* 978

FORMS OF BEQUESTS TO DIFFERENT CHARITIES.

Bequest to the National Society for promoting the Education of the Poor 983

Bequest to Literary Fund Society . . . . . *ib.*

Bequest to the Church Building Society . . . . . *ib.*

Bequest to Incorporated Clergy Orphan Society 984

ADDENDA 985

TABLE OF THE CASES CITED.

ACKROYD *v.* Smithson, 205, 219
Adair *v.* the New River Comp. 433
Adams *v.* Lemberey, 195
Adams and Lambert's Case, 96
Adlington *v.* Cann, 138, 145, 146, 147
Aldrich *v.* Cooper, 227, 231
All Souls' College, *v.* Costar, 792
Amphlett *v.* Parke, 223
Anderson, *Ex parte*, 122
——— *In re*, 501.
Andrew *v.* Merchant Tailors' Company, 405
Andrew *v.* Trinity Hall, 405, 407, 608
Anon. (Lofft. 549), 383
Anon. (1 Salk. 86)
Anon. (12 Mod. 233), 326
Anon. (12 Mod. 560), 468
Anon. Sel. Cas. Ch. 69
Anon. (1 P. Wms. 327), 63
Anon. (2 Freem. 40), 73, 275
Anon. (3 Atk. 277), 412
Anon. (cited 2 Jac. and Walk. 319, 320), 615
Anon. (2 Madd. Ch. Pr. 165), 427
Appleford's Case, 375, 378, 392
Arnold *v.* Attorney Gen. 550
Arnold *v.* Chapman, 123, 163, 207, 229
Ashburnham *v.* Bradshaw, 139
Ashburnham *v.* Thompson, 468
Ashby *v.* Palmer, 215
Atkins *v.* Mountague, 771
Attorney General *v.* Ackland, 132
——— *v.* Andrew, 598, 607
——— *v.* Andrews, 139, 515
——— *v.* Arran (Earl of), 507
——— *v.* Ashburnham (Earl of), 428, 474, 478
——— *v.* Atherstone School (Governors of), 280, 358, 478, 553, 587
Attorney General
——— *v.* Backhouse, 431, 705, 706
——— *v.* Baliol College, 431, 466, 600, 607, 692, 703
——— *v.* Barham, 660
——— *v.* Barnes, 145
——— *v.* Bedford (Corporation of), 370, 409, 467, 510
——— *v.* Berkeley, 709
——— *v.* Berryman, 99, 272
——— *v.* Berwick-upon-Tweed (Corporation of), 473, 517, 629
——— *v.* Black, 341, 733
——— *v.* Bolton, 466, 476
——— *v.* Boultbee, 602, 711, 770, 771
——— *v.* Bowles, 161, 176
——— *v.* Bowyer, 278, 415, 457, 542
——— *v.* Brasen Nose College, 548, 567, 587—594
——— *v.* Bradley, 139
——— *v.* Brentwood School (Master of), 246, 621—625, 638, 714, 715
——— *v.* Brereton, 73, 277, 410, 445, 725
——— *v.* Brewers' Company, 460, 472
——— *v.* Brickdale and others, 688
——— *v.* Bristol (Mayor of), 399, 539, 541, 547, 551, 563, 564, 567—570
——— *v.* Brooke, 445, 454, 697, 703
——— *v.* Brown, 79, 431, 735
——— *v.* Buckland, 63
——— *v.* Bucknall, 67
——— *v.* Bullen, 430
——— *v.* Buller, 658, 688

Attorney General
——— v. Burdett, 515
——— v. Butler (Sir J.), 408
——— v. Caldwell, 157, 232
——— v. Cambridge (the Margaret and Regius Professors in), 69, 600
——— v. Cambridge (the University of), 453
——— v. Carlisle (Mayor and Corporation of), 78, 405
——— v. Carmarthen (Corporation of), 452, 673
——— v. Carte, 476
——— v. Catherine Hall, Cambridge (Master of), 340, 343, 370, 541, 571—575, 705
——— v. Chester (Bishop of), 190, 273, 650
——— v. Cholmley, 408
——— v. Christchurch (Dean and Canons of), 352, 458, 471, 630, 634, 645, 648, 768
——— v. Christ's Hospital, 598, 599, 993
——— v. Clarendon (Earl of), 340, 409, 426, 457, 640—645, 652, 708, 739
——— v. Clarke, 63, 523
——— v. Clements, 408, 684
——— v. Cock, 73, 104, 415, 518
——— v. Combe, 275
——— v. Comber, 62
——— v. Coopers' Company, 142, 445, 613, 615, 645, 647, 733
——— v. Coventry (Mayor of), 340, 550, 564
——— v. Cowper, 738
——— v. Cross, 696
——— v. Davies, 135, 142, 175, 177, 178, 180, 195, 650
——— v. Davy, 723
——— v. Day, 120, 135
——— v. Dixie, 340, 341, 409, 410, 457, 637, 638, 708, 733
——— v. Dove, 475
——— v. Downing, 140, 515
——— v. Doyley, 67
——— v. Dublin (Mayor of), 81, 277, 421, 423, 425
——— v. Dudley (Lord), 416, 479
——— v. Duplessis, 149
——— v. Ellison, 709
——— v. Exeter (Corporation of), 404, 456, 464, 465, 627, 628
Attorney General
——— v. Fea, 408
——— v. Fellows, 403
——— v. Fletcher, 766, 992
——— v. Floyer, 736
——— v. Foley (Lord), 994
——— v. Forster, 563, 724
——— v. Foundling Hospital (Governors of), 335, 415, 697
——— v. Fowler, 75, 416, 419, 427
——— v. Foyster, 341, 444
——— v. France, 738
——— v. Freeman, 527
——— v. Fullerton, 415
——— v. Galway (Corporation of), 77, 399, 609
——— v. Gardner, 445
——— v. Gaunt, 432, 738
——— v. Geary, 713
——— v. Giles, 266, 988
——— v. Glegg, 477, 526
——— v. Goddard, 186, 438
——— v. Goldsmiths' Company, 451, 453
——— v. Gore (Lord), 445
——— v. Goulding, 195, 197, 650
——— v. Gower (Lord), 444, 711
——— v. Grant, (Rector of St. Dunstan's), 657
——— v. Graves, 154, 226, 233, 242
——— v. Green, 248, 401, 404, 431, 478, 485, 487, 697, 699
——— v. Griffith, 457, 478, 697, 701, 704
——— v. Guise, 275, 607
——— v. Gutch, 478, 628, 702
——— v. Haberdasher's Company, 86, 401, 584, 635—637, 653
——— v. Hall, 669
——— v. Harley, 166
——— v. Harrow School (Governors of), 293, 336, 354, 370, 410, 444, 653
——— v. Hartley, 141, 419, 476, 621, 630, 631, 646, 733, 734
——— v. Heartwell, 140
——— v. Heelis, 77, 421
——— v. Herrick, 73, 272, 539
——— v. Hesketh, 403
——— v. Hewer, 411
——— v. Hewitt, 400, 407
——— v. Hickman, 104, 530
——— v. Hinxman, 188, 201, 203, 479, 650

Attorney General
——— v. Hotham (Lord), 478, 697, 700, 710
——— v. Hudson, 523
——— v. Hungerford, 688, 692—694
——— v. Huntingdon (Corporation of), 475
——— v. Hurst, 621
——— v. Hutchinson, 192
——— v. Hyde, 174, 192
——— v. Ingilby, 478, 703
——— v. Ironmongers' Company, 273, 606
——— v. Jackson, 299, 433, 437
——— v. Jeanes, 444
——— v. Johnson, 549
——— v. Johnstone, 596
——— v. Jolliffe, 995
——— v. Jones, 765
——— v. Jordan, 188
——— v. Landerfield, 407
——— v. Llandaff (Bishop of), 603
——— v. Leathersellers' Company, 444
——— v. Lechmere, 496
——— v. Leicester (Mayor, &c. of), 444
——— v. Leigh, 769
——— v. Lepine, 261
——— v. Litchfield (Bishop of), 724
——— v. Locke (Morden College, Blackheath), 371, 384, 409, 772
——— v. Lloyd, 141, 703
——— v. London (City of), 72, 73, 433, 468, 603
——— v. Londonderry (Marchioness of), 273
——— v. Lonsdale (Earl of), 70, 75, 652, 702
——— v. Lowndes, 453
——— v. Magwood, 707
——— v. Mansfield (Earl of), 470, 473, 630, 631, 634, 635, 638, 646, 647
——— v. Matthew, 728
——— v. Matthews, 269, 271, 272
——— v. Mercers' Company, 472, 653
——— v. Merchant Tailors' Company, 406, 448, 449, 451, 452, 608, 989, 990
——— v. Meyrick, 155, 157
Attorney General
——— v. Middleton, 268, 277, 343, 350, 410
——— v. Mill, 173, 258, 449
——— v. Minshull, 614, 615
——— v. Molland, 416, 670
——— v. Morgan, 703
——— v. Morland, 736, 966
——— v. Moses, 433, 687
——— v. Mountmorris (Lord), 231
——— v. Munby, 130, 157, 190, 198, 250
——— v. Nash, 174, 175, 177, 180, 448
——— v. Newbury (Corporation of), 473
——— v. Newcombe, 421, 445, 724
——— v. Newman, 268, 277
——— v. Norris, 404
——— v. Oakaver, 71
——— v. Oglander, 650
——— v. Oglender, 427, 428, 477
——— v. Owen, 478, 697, 699
——— v. Oxford (Bishop of), 190, 620, 649
——— v. Painter — Stainers' Company, 546, 660
——— v. Parker, 73, 411, 444, 446, 563, 725
——— v. Parkin, 597
——— v. Parsons, 192
——— v. Peacock, 62, 272
——— v. Pearce, 60
——— v. Pearson, 104, 106, 108, 416, 743, 744—747, 749, 762, 767
——— v. Pembroke Hall, 601, 689
——— v. Platt, 600
——— v. Platt (Sir John), 353
——— v. Plumptree, 427
——— v. Powel, 427
——— v. Power, 110, 111, 122, 262
——— v. Price (Berkhampstead School), 65, 379, 470, 695
——— v. Pyle, 607
——— v. Rance, 63
——— v. Retford, East (Corporation of), 465, 472
——— v. Rigby, 715
——— v. Rochester (Mayor of), 425, 656, 657, 704
——— v. Ruper, 28, 71

Attorney General,
——— v. Rutter, 724
——— v. Rye, 515, 516
——— v. St. John's College, Cambridge, 337, 594—596, 598
——— v. St. John's College, 432, 448, 452, 989
——— v. St. Paul's (Dean and Chapter of), 453
——— v. Saltwell, 515.
——— v. Scott, 351, 444, 703, 723
——— v. Sedgwick, 703
——— v. Shelley, 434
——— v. Shore, 108, 749—761, 768
——— v. Shrewsbury (Town of), 337, 729
——— v. Sibthorpe, 670
——— v. Siderfin, 269, 270, 272
——— v. Skinner's Company, 245, 246, 404, 471, 480, 543, 544, 551—556, 575—579, 579—582, 659.
——— v. Smart, 268, 431, 477
——— v. Smithies, 566, 585
——— v. Solly, 653, 659
——— v. Stafford (Corporation of), 460, 471
——— v. Stafford (Marquis of), 382, 725
——— v. Stamford (Mayor of), 444, 639, 697, 708
——— v. Stephens, 365, 721, 992
——— v. Stepney, 72, 204, 602, 665
——— v. Stewart, 122, 265
——— v. Talbot, 330, 343, 345, 356, 357, 361, 410, 446, 466
——— v. Tancred, 249
——— v. Tomkins, 154, 232
——— v. Townley, 442
——— v. Tonna, 432, 476, 561, 612, 659
——— v. Twisden, 431
——— v. Tyler, 427
——— v. Tyndall, 122, 154, 170, 187, 188, 228
——— v. Vivian, 71, 89, 400, 426, 445, 620, 658
——— v. Wansay, 142, 613
——— v. Ward, 207, 562, 703, 716
——— v. Warren, 415, 446, 689, 690
——— v. Watson, 507
Attorney General
——— v. Weymouth (Lord), 120, 163, 164, 165, 231, 448
——— v. Whitchurch, 176, 183, 198, 602, 650
——— v. Whiteley, 445, 446, 630, 633
——— v. Whorwood, 69, 86, 273, 410
——— v. Wilkinson, 732
——— v. Williams, 179, 182
——— v. Wilson, 542, 701
——— v. Winchelsea (Earl of), 226, 621
——— v. Winchester, 475
——— v. Wray, 687
——— v. Wyatt, 427
——— v. Wyburgh, 434, 435
——— v. Wycliffe, 730
——— v. York (Dean of) and others, 702
——— v. Young, 453
Aubin v. Daly, 9, 244
Aylet v. Dodd, 287, 465, 477.
Ayr v. Smallpiece, 785

B.

Bagg's Case, 376
Bagnall and Pot's Case, 98
Bagshaw v. Bossley, 732
Baker v. Carte, 469
——— v. Hall, 212
Bampfield's Charity, *In re*, 497
Banker's Case, 672
Barker v. Rayner, 596
Barclay v. Russell, 213, 402
Barrington v. Hereford, 210
Bartlett v. Downes, 798
Basevi v. Serra, 479
Bateman's Charity, *In re*, 497
Bath (Earl of) v. Abney, 742
Batteley v. Cooke, 438
Bayley v. Adams, 448
Baylis v. Attorney General, 527, 651
Bays v. Bird, 712
Bedford Case, 804, 806
——— Charity, *In re*, 105, 108, 370, 485, 510, 648
Bedfordshire Case, 801
Bellamy v. Burrow, 144
Bennet College, Cambridge v. Bishop of London, 247
Bennett v. Atkins, 469

Bennett v. Honeywood, 64
Bentley v. Bishop of Ely, 344, 370.
Bettesworth v. Dean, &c. of St. Paul's, 683
Berkhampstead Free School, *Ex parte*, 336, 370, 621, 659, 705
Berry v. Usher, 205
Birch v. Barston, 438
Bishop v. Talbot, 144, 149
Blackburn v. Webster, 438
Blackburne, *Ex parte*, *In re* Taylor's Charity, 507.
Blacket v. Blizard, 726
Blackston v. Hemsworth Hospital, 683
Bland v. Bland, 141, 669
—— v. Wilkins, 209
Blandford v. Thackerell, 65, 180, 188, 189, 198, 203
Blankard v. Galby, 122
Bolton v. Corporation of Liverpool, 710
—— School, *Ex parte*, 341, 738
Bonithorn v. Hockmore, 468
Boreman's Case, 392
Boson v. Statham, 144, 146
Bowaman v. Reeve, 228
Bradshaw v. Tasker, 114, 454
Bramble v. the Poor of Havering, 517
Brandon v. Brandon, 63
Brest v. Offley, 141
Brett v. Cumberland, 598
British Museum (Trustees of) v. White, 70, 241
Bristol (Mayor of) v. Whitton, 515
Brocksopp v. Barnes, 467
Brodie v. Duke of Chandos, 190
Bromley v. Smith, 420
Brounker (Lord) v. Atkins, 771
Brown v. Bruce, 438
——— v. Higgs, 214
——— v. Yeale, 663
——— *Ex parte*, *In re* Sir J. Norris's Charity, 488
Brunsden v. Woolridge, 65
Buckeridge v. Ingram, 160
Budcoak's Case, 393
Buggins v. Yeates, 141
Bull v. Kingston, 669
Bunting v. Williamson, 112
Burford (Corporation of) v. Lenthall, 290, 292
Burke v. Browne, 455
Burls v. Smith, 772

C.

Caffrey v. Darby, 469
Caius College (Case of), 719
Calverley's (Lady), Charity, *In re*, 498
Calvin's Case, 122
Campbell v. Hall, 122
——— v. The Earl of Radnor, 168, 263
Cantwell v. Baker, 173, 178
Carlisle (Mayor of) v. Blamire, 676
Carr v. Bedford, 63
Carter's Charity, *In re*, 498
Cary v. Abbot, 70, 95, 110
Catherine Hall (Case of), 719
Chamberlain v. Agar, 149
Champion v. Smith, 62, 288
Chauter v. Glubb, 788
Chapman v. Brown, 157, 195, 200, 206
Cheeseman v. Partridge, 517
Chelmsford (the Poor of) v. Sir H. Mildmay, 295
Cherry v. Mott, 993
Chertsey Market, *In re*, 431, 485, 494, 495, 739
Chichester (Bishop of) v. Harward, 327
Chipping Sodbury School, *In re*, 495, 735
Chitty v. Parker, 412
Christ's College, Cambridge (Case of), 69
Clare Hall (Case of), 719
Clifford v. Francis, 73, 269, 271
Clifton v. Lombe, 141
Clowdsly v. Pelham, 141
Cockburn v. Thompson, 433
Cogan v. Stephens, 986
Colchester (Mayor, &c. of) v. Lowten, 673, 739
Colchester Case, 806
Coleman v Coleman, 597
Collins v. Blantern, 126
Collison's Case, 75, 246
Collison v. Pater, 164
Collyer v. Burnett, 263
Colman v. Sarell, 468
Coningham v. Mellish, 210
Cook v. Duckenfield, 210, 412, 525, 526
Cook v. Loveland, 726
Cookson v. Ellison, 442
Cooper v. Day, 164
Cope v. Bedford, 7

Corbyn v. French, 74, 132, 162, 649
Corpus Christi College (Case of,) 28
——— Oxon v. Naunton, 289, 290
Cottington v. Fletcher, 144
Coventry (Mayor of) v. Attorney General, 472, 551, 739
——— (City of), v. Attorney General, 184, 340
Cowtan v. Williams, 710
Coxe v. Basset, 669
Cox's Case, 728
Craigdallie v. Aikman, 743
Crichton v. Grierson, 66
Croft v. Evetts, 273
Crook v. Brookeing, 144
Crosbie v. The Mayor of Liverpool, 221, 480
Croydon Hospital v. Farley, 516
Crowder v. Clowes, 164
Cruse v. Barley, 205, 219, 225
Cunliffe v. Cunliffe, 141
Currie v. Pye, 163, 219, 475
Curteis v. Candler, 469
Curtis v. Hutton, 168, 258, 263
——— v. Rippon, 141
——— v. The Kent Waterworks, 726

D.

Dann, *Ex parte*, 342
Davison's Case, 363
Davis v. Jenkins, 384, 411, 416, 762
Dawson v. Clarke, 468
De Costa v. De Paz, 99, 100, 106, 107
De Garcin v. Lawson, 90, 99, 100
Derby Canal Company v. Wilmot, 675
De Themmines v. De Bonneval, 90, 93, 187, 400
Devisme v. Mellish, 64
Devonshire (Earl of) v. Gibbons, 423
Digby v. Legard, 205
Dineley v. Dineley, 442
Dixon v. Dawson, 221, 229
—— v. Kershaw, 721
—— v. Metcalfe, 721
Doe d. Burdett v. Wright, 138, 143
—— d. Clarke v. Grant, 711
—— d. Coyle v. Cole, 730, 735
—— d. Davy v. Haddon, 735
Doe d. Dupleix v. Roe, 711, 737
—— d. Evans v. Evans, 10
—— d. Goldin v. Lakeman, 542
—— d. Hayne v. Redfern, 10
—— d. Higgs v. Terry, 985
—— d. Howson v Waterton, 124, 130
—— d. Jackson v. Hiley, 32
—— d. Jones v. Jones, 764, 800
—— d. Marsack v. Read, 711
—— d. Nicholl v. M'Keag, 763
—— d. Churchwardens, &c. of Orleton v. Harpur, 32
—— d. Phillips v. Aldridge, 144, 199
—— d. Preece v. Howells, 63, 129, 136
—— d. Tennyson v. Lord Yarborough, 681
—— d. Thanet v. Gartham, 367, 730
—— d. Thompson v. Pitcher, 72, 74, 87, 124—127
—— d. Toone v. Copestake, 84, 138
—— d. Wellard v. Hawthorn, 74, 89, 124, 129, 137
Down v. Worrall, 529
Downing College (Case of), 470
Downton Case, 805
Doyley v. Attorney General, 537
Drakeford v. Wilks, 149
Drewry v. Barnes, 441
Dummer v. The Corporation of Chippenham, 443, 732
Dundas v. Dutens, 403
Durour v. Motteux, 72, 86, 216

E.

Eacles v. England, 141
Eade v. Eade, 669
East v. Ryal, 287, 471
—— Greensted's Case, 297, 298, 299, 300
—— India Company v. Edwards, 710
Eden v. Foster, 288, 333, 335, 343, 409.
Edenborough v. Archbishop of Canterbury, 107, 724
Edge v. Salisbury, 63
Edinburgh (Provost, Bailiffs, &c. of) v. Aubery, 268
Edwards v. Pike, 145

Egerton's (Lady), case, 98
Eilbeck *v.* Wood, 131
Ellis *v.* Selby, 669
Ellison *v.* Airey, 467
Eltham Parish *v.* Warreyn, 75, 285, 287, 544, 698, 712
Emblyn *v.* Freeman, 209
Emery *v.* Hill, 262
Englefield's Case, 715
English *v.* Ord, 186
Evelin's Case, 29
Evelyn *v.* Forster, 122
Ewen *v.* Bannerman, 671
Ewre (Lord) *v.* Strickland, 598

F.

Fairchild *v.* Gayre, 326, 331
Falkland (Lord) *v.* Bertie, 267
Farnworth *v.* Bishop of Chester, 721
Faulkner *v.* Elzer, 724
Fearon *v.* Webb, 63, 724
Fearns *v.* Young, 474
Fellows *v.* Till, 990
Fenton *v.* Hughes, 442
Fielding *v.* Bound, 514
Finch *v.* Squire, 159
Fitzgerald, *In re*, 503
Fleming *v.* Gooding, 710
Flood's Case, 69
Foley *v.* Attorney General, 739
—— *v.* Wontner, 419, 733, 736, 743, 767
Forbes *v.* Ball, 141
Forrest *v.* Elwes, 468
Foster *v.* Blagden, 122, 230
Foulser *Ex parte*, *In re* Lord Sudbury's Charity, 441, 486, 495, 651
Fowler *v.* Garlike, 663
——— *v.* Willoughby, 597
Foy *v.* Foy, 189
Franklin's Charity, *In re*, 773, 777
French *v.* Dear, 438
Friendly Society, *Ex parte*, 2, 495,

G.

Gape *v.* Handley, 562
Garstang Church Town School, *In re*, 342, 485
Gates *v.* Jones, 89
Gibbons *v.* Maltyard, 70, 94
Gibbs *v.* Ougier, 215
Gibbs *v.* Rumsey, 154, 221, 663
Giblett *v.* Hobson, 181, 194, 479
Gloucestershire Case, 801, 806
Glubb *v.* Attorney General, 189
Goddard's (Dr.) Case, 383, 393
Goffe *v.* Webb, 64
Gonville's and Caius College (Case of), 719
Goodinge *v.* Goodinge, 68
Gort and Corporation of Limerick *v.* Attorney General, 78, 421
Gower *v.* Eyre, 712
Gozna *v.* The Aldermen of Grantham, 675
Gravenor *v.* Hallum, 208
Green *v.* Howard, 63
—— *v.* Jackson, 225
—— *v.* Rutherforth, 331, 354, 359, 360, 365, 410
Greenfield *v.* Raynall, 438
Greenhouse, *Ex parte*, 472, 490, 496, 740
Greenstead, East *v.* Howard, 291
Greenwood *v.* Bishop of London, 127
Grieves *v.* Case, 74, 128, 130, 169, 199
Griffith *v.* Jones, 63
Grimmett *v.* Grimmett, 186
Grindley *v.* Barker, 726
Grumbell *v.* Roper, 682
Gwydir (Lord), *Ex parte*, 12
Gunstone *v.* Dare, 392

H.

Haberdashers' Company *v.* Attorney General, 471
Hammond *v.* Thorpe, 403
Hampton *v.* Spencer, 144
Hanby *v.* Roberts, 228
Hands *v.* Hands, 64
Harcourt *v.* Fox, 797
Hardacre *v.* Nash, 210
Harding *v.* Glynn, 63
Harland *v.* Trigg, 141
Harley *v.* Phillips, 468
Harris *v.* Barnes, 189
Harrison *v.* Bulcock, 791
——— *v.* Archbishop of Dublin, 327
——— *v.* Evans, 106
——— *v.* Harrison, 163
Hawes's Charity, 804
Hayter *v.* Trego, 270, 610

Hellam's Case, 515
Henchman *v.* Attorney General, 213
Henderson *v.* M'Ivor, 468
Henshaw *v.* Atkinson, 174, 182, 188
Herbert *v.* Dean and Chapter of Westminster, 722
Hereford (Bishop of), *v.* Adams 615—619
——— *v.* Scory, 681
Hertford (Borough of) *v.* Poor of Hertford, 472
Heyes *v.* Exeter College, 720
Hide *v.* Heywood, 468
Hide's Case, 285, 299
Higgins *v.* Southampton, 515
Hill *v.* Burns, 671
—— *v.* Cock, 205, 215
—— *v.* Bishop of London, 141, 205
Hillyard *v.* Taylor, 122
Holderness (Earl of) *v.* Lord Carmarthen, 9, 243
Homan *v.* Moore, 710
Hone *v.* Medcraft, 154
Hope *v.* Taylor, 210
Horde *v.* Earl of Suffolk, 529, 655, 668
Horn *v.* Ivy, 675
Horne, *Ex parte*, 160
Horwood *v.* West, 141
How *v.* Best, 442
Howse *v.* Chapman, 75, 157, 160, 219, 987
Hudson *v* Mucklow, 428
Hughes *v.* Biddulph, 710
Hull (Mayor of) *v.* Horner, 350
Hutcheson *v.* Hammond, 205
Hutton's Charity, *In re*, 497,
Hynshaw *v.* Corporation of Morpeth, 70, 97, 288, 295, 409, 544

I.

Ilchester (Bailiff of) *v.* Bendishe, 816
Ingleby *v.* Dobson, 192
Isaac *v.* De Friez, 65
—— *v.* Gomperts, 100, 107
Jackson *v.* Hurlock, 211
——— *d.* M'Guirk *v.* Reilly, 111
James *v.* Allen, 84, 667
——— *v.* Rich, 438
Jenning's Case, 353
Jennor *v.* Harper, 515
Jessopp *v.* Watson, 222
Jesus College *v.* Gibbs, 8, 9
——— Case of, 69, 246, 515, 517
Johnston *v.* Swann, 75, 154, 174, 181, 241
Jolliffe *v.* East, 479
Jones *v.* Beale, 63
—— *v.* Lewis, 468, 470
—— *v.* Nabbs, 141
—— *v.* Mitchell, 72, 222, 481
—— *v.* Williams, 61, 75
Jordeyn's (or Yordon's) Charity, *In re*, 584
Jortin, *Ex parte*, 612, 615
Jorton, *Ex parte*, 142
Joyce *v.* Osborne, 771

K.

Keble *v.* Thompson, 471
Kellett *v.* Kellett: 205
Kennell *v.* Abbott, 210
Kennington Hastings (Case of), 543
Kenn's Case, 369
Kerry *v.* Derrick, 542
Kildare (Bishop of) *v.* Archbishop of Dublin, 327
King *v.* Baylay, 715
King's College, Cambridge *v.* Eton College, 350
Kirby *v.* Potter, 597
Kirkbank *v.* Hudson, 171, 412
Kirkby Ravensworth, *Ex parte*, 280, 291, 296, 346, 739
Knapp *v.* Williams, 158
Knight *v.* Martin, 470

L.

Lanchester *v.* Thompson, 442
Lane, *Ex parte*, *In re* Kingsbridge School, 653
Lane's Case, 681
Lansdowne *v.* Lansdowne, 141
Laying *v.* Paine, 732
Leacroft *v.* Maynard, 164, 479
Lechmere *v.* Lavie, 142
Lee *v.* Alston, 712
Legge *v.* Asgill, 59
Legh *v.* Lewis, 732
Le Grice *v.* Finch, 597
Le Maitre *v.* Bannister, 141
Leslie *v.* Devonshire, 205
—— *v.* Birnie, 420, 763

Lewis *v.* King, 141
Limbrey *v.* Gurr, 124
Lloyd *v.* Spillet, 205
London (Mayor of) *v.* Long, 562
——— (City of) *v.* Garway, 205
——— (Case of the Mayor of,) 62, 516
Lord *v.* Kellett, 403
Loyd *v.* Spillet, 471, 539
Ludlow (Corporation of) *v.* Greenhouse, 269, 400, 401, 425, 472, 482, 484, 485, 490, 738, 740, 741
Lutkins *v.* Leigh, 228
Lydiatt *v.* Fouch, 683
Lyme Regis (Mayor and Burgesses of,) *v.* Henley, 424

M.

Macnamara *v.* Jones, 468
Mackintosh *v.* Townsend, 122, 260
Magdalen College (President of), *v.* Sibthorpe, 412, 446
Magdalen College (Case of), 715
Mahon *v.* Savage, 64
Makeham *v.* Hooper, 257
Maleverer *v.* Spinke, 712
——— *v.* Radshaw, 126
Malim *v.* Keighley, 142
Mallabar *v.* Mallabar, 210, 225
Man *v.* Ballet, 284, 471
Market Raisen (Parish of) *v.* Brownlow, 300
Marlborough (Duke of) *v.* Lord Godolphin, 525
Marshall *v.* Holloway, 467
——— *v.* Corporation of Queenborough, 676
Martin *v.* Hutton, 149
——— *v.* Paxton, 656
Massey *v.* Sherman, 141
Masters *v.* Hooper, 64
——— *v.* Masters, 523
Matthew *v.* Burdett, 728
Matthews *v.* Venables, 131
Mavor *v.* Nixon, 412
Maughan *v.* Mason, 205, 216, 217
Mellick *v.* the President and Guardians of the Asylum, 87, 240
Meredith *v.* Heneage, 142
Mercers (Mystery of) *v.* Attorney General, 558, 559
Mestaer *v.* Gillespie, 149
Meux *v.* Maltby, 420, 433
Middleton *v.* Cater, 9, 206, 257
Middleton *v.* Clitherow, 172
——— *v.* Spicer, 213
Middleton's (Sir T.) Case, 288
Miller *v.* Bloomfield, 789
Milligan *v.* Mitchell, 418, 419
Mills *v.* Farmer, 514, 521, 522, 523, 666
Minet *v.* Vulliamy, 656
Modbury School, *In re*, 498
Mogg *v.* Hodges, 164, 208, 225, 229
Moggridge *v.* Thackwell, 270, 474, 514, 519, 530, 536
Mohun *v.* Mohun, 474
Moises *v.* Thornton, 675
Monill *v.* Lawson, 414
Moondalay *v.* Morton, 443
Morice *v.* Bishop of Durham, 59, 83, 666
Mosley *v.* Ward, 468,
Mountague *v.* Jeoffereys, 131
Mountague's (Lord E.) Case, 515
Muckleston *v.* Brown, 153
Mucklow *v.* Attorney General, 428

N.

Negus *v.* Coulter, 154
Newbold *v.* Roadnight, 597
New *v.* Jones, 467
Newland *v.* Attorney General, 82
Newton *v.* Pelham, 153
Nicholson *v.* Masters, 438
Norris *v.* Norris, 468
North *v.* Crompton, 210
Northcote *v.* Underhill, 703
Norton *v.* Summers, 126
Norway *v.* Norway, 474
Nowlan *v.* Nelligan, 141

O.

O'Callaghan *v.* Cooper, 469
Oliphant *v.* Hendrie, 258, 259
Ommanney *v.* Butcher, 85, 270, 519, 668
Osborne *v.* Denne, 474
Oxford (Case of the Earldom of), 715

P.

Packwood *v.* Maddison, 469
Page *v.* Leapingwell, 165, 214
Paice *v.* Archbishop of Canterbury, 154, 157, 219, 270, 480, 528

Paine v. Hall, 154
Palmer v. Schribb, 141
Parkinson's Case, 332, 343, 375, 392
Parry v. Juxon, 141
Parsons v. Baker, 141
Patrick's (Dr.) Case, 375
Pawlet v. Bishop of Lincoln, 431
Peacock v. Thewer, 299
Pearce v. Piper, 415
Pearse v. Green, 469
Pearson v. Pearson, 479
——— *Ex parte, In re* Macclesfield School, 492, 494
——— *Ex parte*, 419
Peat's Case, 384
Pelham v. Anderson, 176
Pember v. Inhabitants of Knighton, 72
Pennyman v. Jenny, 516
Pentred v. Payer, 72
Peto v. Attorney General, 453
Philips v. Bury, 330, 331, 332, 360, 368, 369, 370, 376, 378
Phillips v. Pearce, 29, 32
——— v. Phillips, 224
——— v. Walters, 769
Pickering v. Lord Stamford, 154, 157, 226
Pierson v. Garnet, 141
Pieschel v. Paris, 240, 538, 651
Piggot v. Penrice, 517
Pike v. Hoare, 122
Pits v. Webster, 96
Plate & St. John's College, Cambridge, 247
Plummer v. May, 442
Pocock v. Reddington, 468
Podmore v. Gunning, 149
Pope v. Whitcombe, 64
Popham v. Lady Aylesbury, 210
Poor v. Mial, 214
Poore v. Clark, 431
Porter v. Clarke, 419
Porter's Case, 19, 88, 94, 244, 542
Powel v. Milbank, 382
Powell v. Attorney General, 62
Powerscourt v. Powerscourt, 74, 530, 655
Preston v. Carr, 709
Price v. Hathaway, 132, 134, 198
Priddy v. Rose, 9
Pritchard v. Arbouin, 175, 178
Prosser, *Ex parte*, 122
Protector (The) v. Craford, 383
Pugh v. Ryal, 703, 707
Pushman v. Filliter, 669

Q.

Queen's College, Cambridge, *In re*, 719, 720
Queen's College (Case of), 342, 347

R.

Radcliffe v. Davy, 709
Radnor Parish (Case of), 438
Randell v. Bookey, 205
Raphael v. Boehm, 469
Rawson v. Turner, 289
Raymond v. Brodbelt, 597
——— v. Mowbray, 64
Reading (Mayor of) v. Lane, 288
——— (Corporation of) v. Lane, 62
Read's (Sir Bartholomew) Case, 97
Reech v. Kennegal, 149
Rees, *Ex parte*, 486
Reeve v. Parkins, 415
Reresby v. Farrer, 415, 698
Revett v. Brown, 765
Rex v. Agar, 784
—— v. All Souls' College, Oxford, 395, 396
—— v. Aylesbury, 779
—— v. Barker, 384
—— v. Bates, 160
—— v. Beeston, 29, 726, 728
—— v. Bellringer, 562
—— v. Bland, 396
—— v. Blooer, 383
—— v. Cambridge (Vice Chancellor of), 25
—— v. Cambridge (University of), 365, 383, 386, 397
—— v. Canterbury (Archbishop of), 393, 415
—— v. Carlile, 103
—— v. Catt, 786
—— v. Chester (Bishop of), 327, 367, 368, 382, 397
—— v. Chester (Mayor, &c. of), 562
—— v. Clifton upon Dunsmore, 60, 778

Rex v. Corum, 474
—— v. Dagger Lane Chapel, 385
—— v. Dowse, 728
—— v. Durham (Bishop of) 327
—— v. Ely, (Bishop of) 345, 346 365, 367, 386, 390, 394
—— v. Fakenham, (Inhabitants of), 780
—— v. Field, 784
—— v. Gardner, 785
—— v. Gaskin, 367, 397
—— v. Gower, 360, 392
—— v. Gray's Inn (Benchers of), 33, 392
—— v. Green, 787
—— v. Gregory, 333, 337
—— v. Grundon, 361, 364
—— v. Hall, 63
—— v. Halesworth, (Inhabitants of), 782
—— v. Hambledon, 50
—— v. Haworth, (Chapelwardens of) 442
—— v. Jennings, 354
—— v. Jotham, 385, 801
—— v. Kensington (The Trustees of St. Mary, Abbotts), 738
—— v. Kent (Justices of), 738
—— v. Lacy, 788
—— v. Lakenheath, 731
—— v. Lincoln's Inn, (Benchers of) 33, 364, 392
—— v. Mattishall, 781
—— v. Melborne, 731
—— v. Miles, 474
—— v. Morpeth, (Bailiffs of) 383, 396
—— v. Munday, 787, 803
—— v. New College, 375
—— v. Newman, 69, 245
—— v. Osbourne, 562, 563
—— v. Owersby le Moore, 731, 799
—— v. Parker, 383
—— v. Pasmore, 334
—— v. Physicians (College of), 393
—— v. Portington, 95, 98, 273
—— v. Quainton, 778
—— v. St. Albans (Mayor of), 562
—— v. St. Bartholomew's Hospital, 783
—— v. St. Catherine's Hall, Cambridge (Master and Fellows of), 338, 354
—— v. St. Giles's, York, 788
—— v. St. John's College, Cambridge, 392
Rex v. St. John's College, Oxford, 364, 396
—— v. St. Matthew's, Bethnal Green, 778
—— v. St. Paul's, Exeter, 781
—— v. St. Saviour's, Southwark (the Churchwardens of), 395
—— v. Scott, 562, 784
—— v. Sculcoates, 785
—— v. Surgeons in Ireland (The Royal College of), 393
—— v. Varlo, 562
—— v. Stafford (Marquis of), 382
—— v. Vaughan, 122
—— v. Waddington, 103
—— v. Waldo, 783
—— v. Wavell, 438
—— v. Whaley (Dr.), Master of Peterhouse College, Cambridge, 395
—— v. Wheeler, 392
—— v. Whitaker, 726
—— v. Wilkes, 399
—— v. Williams, 103
—— v. Windham, 365, 386, 444
—— v. Witham, 801
—— v. Woodward, 785
—— v. Woolston, 103
—— v. Worcester (Bishop of) 345, 391
—— v. York (Archbishop of) 303, 395, 397, 728
Reynal's Case, 798
Richardson v. Chapman, 141
Rivett's Case, 515
Risley School, *In re*, 367, 646
Roach v. Hammond, 63
Roberts v. Pocock, 597
——— v. Walker, 218
Robinson v. Taylor, 205, 225
Robson v. Hyde, 784
Roche v. Magell, 448
Rockley v. Keyley, 287, 291
Roe *d.* Lord Berkeley v. Archbishop of York, 681
Rogers v. Pitcher, 710
——— v. Rogers, 210
Rolt's Case, 515
Rugby School (Case of) 640
——— *Ex parte*, the Trustees of, 395
Rumbold v. Rumbold, 139

S.

St. Dunstan (Parish of) v. Beauchamp, 288, 289

St. John's College, Cambridge *v.* Platt, 598
——— *v.* Toddington, 331, 341, 345, 354, 361
St. John's College, Cambridge (Case of), 360
St. John's Hospital, 805
St. Mary Magdalen, Oxford (President of) *v.* Sibthorpe, 446
St. Saviour's, Southwark (Case of), 29
St. Wenn's Charity, *In re*, 487
Sadler, *In re*, 12
Sale *v.* Moore, 142
Salop (the Town of) *v.* Attorney General, 471
Salter *v.* Grosvenor, 676
Sammes *v.* Rickman, 468
Sanderson *v.* Walker, 469
Saunders *v.* Owen, 731
Seagears, *Ex parte*, *In re* Mania Charity, 487
Shanley *v.* Baker, 74, 154, 214
Shaw *v.* Pickthall, 192
Sheddon *v.* Goodrich, 122
Sheffield (Lord) and Ratcliffe's Case, 98
Sheppard *v.* Gosnald, 562
Sherrard *v.* Lord Harborough, 205
Sherratt *v.* Bentley, 474
Shove *v.* Pincke, 131
Simon *v.* Barber, 270, 523
Skinner *Ex parte*, *In re* Lawford Charity, 484, 486, 487, 488, 702, 707
Slewringe's Charity, *In re*, 486
Smart *v.* Prujean, 89
Smith *v.* Barrett, 672
——— *v.* Brown, 122
——— *v.* Claxton, 215
——— *v.* Cottin, 210
——— *v.* Hibernian Mining Company, 431
——— *v.* Moze and Keats, 789
——— *v.* Stowel, 246, 698
——— *v.* Target, 710
Society for the Propagation of the Gospel in Foreign Parts *v.* Attorney General, 656
Somerville *v.* Chapman, 683
Sonley *v.* Clockmakers' Company, 245
Sorresby *v.* Hollins, 120, 184, 241
Sparrow *v.* Hardcastle, 131
Spencer *v.* Warden and Fellows of All Souls' College, Oxford, 375
Spink *v.* Lewis, 205, 224
Sprange *v.* Bernard, 141, 669
Stafford (Earl of) *v.* Buckley, 9, 243
Stamp *v.* Cooke, 64
Stamp's Case, 383
Starkey *v.* Brooks, 205
Steers *v.* Burt, 995
Steward *v.* East India Company, 442
Stickland *v.* Aldridge, 149
Stonehouse *v.* Evelyn, 205
Sudbury Case, 805
Supple *v.* Lawson, 64, 652
Sutton Colefield (Case of) 288, 295, 297, 409, 544
Sutton's Hospital, 329, 542, 672

T.

Tadcaster School and Hospital, *In re*, 497
Tay *v.* Slaughter, 515
Taylor *v.* Dullidge Hospital, 685
——— *v.* George, 141
——— *v.* Pembroke, 742
Taylor's Case, 105, 106
Tawney's Case, 441
Tebbs *v.* Carpenter, 469
Tewkesbury (Bailiffs, &c. of) *v.* Bucknall, 562
Thellusson *v.* Woodford, 81
Thetford School (Case of), 545—548
Thomas *v.* Hole, 63
Thynn *v.* Thynn, 149
Tone (Conservators of the River) *v.* Ash, 26, 27
Townley *v.* Bedwell, 76
Tregonwell *v.* Sydenham, 212
Turner *v.* Ogden, 71

U.

Upton Warren, *In re*, 491
Usher's Case, 389

V.

Vaughan *v.* Farrer, 132, 155, 174 179
Vawser *v.* Jeffery, 131
Vernon *v.* Vernon, 141
Vezey *v.* Jamson, 83, 523, 667
Villareal *v.* Mellish, 105

W.

Wade *v.* Stanley, 403
Wagstaff *v.* Wagstaff, 515
Waite *v.* Webb, 164, 203, 241
Waldern *v.* Ward, 97
Waldo *v.* Caley, 455, 530, 652, 655, 668
Wales (Princess of) *v.* Lord Liverpool, 709
Walker *v.* Denne, 213, 225
Walker's (Dr.) Case, 389, 394
Waller *v.* Childs, 105
Walpole's Case, 89
Walton *v.* Merry, 990
Ward *v.* Cooke, 452
Ward's Charity, *In re*, 497
Warner *v.* North, 292
Warren *v.* Newton, 766
Waterhouse *v.* Holmes, 163
Watts *v.* Turner, 470
Watson *v.* The Master of Hemsworth Hospital, 683
——— *v.* Hinsworth Hospital, 704
Webster, *Ex parte*, 12
Weld *v.* Hornby, 563
Wellbeloved *v.* Jones, 269, 411, 412
West *v.* Knight, 62
—— *v.* Shuttleworth, 116
Wharton *v.* Charles, 287, 299
Wheeler *v.* Sheer, 520, 651
Whetstone's Case, 89
Whistler *v.* Newman, 469
White *v.* White, 64, 514, 523, 532
Whitford *v.* Tutin, 772
Whithorne *v.* Harris, 63
Whitley *v.* Fishbourne, 503
Wickham *v.* Wood, 89
Widmore *v.* The Governors of Queen Anne's Bounty, 610
——— *v.* Woodroffe, 63, 171
Widdrington's Case, 375, 396
Wilkinson *v.* Beal, 431
——— *v.* Malin, 629, 727, 731
Wilkinson, *In re*, 773, 777
Wilkson's Charity, *In re*, 498
Willan *v.* Willan, 455, 691
Willet *v.* Sandford, 139
Williams *v.* Steward, 791
——— *v.* Whinyates, 431
——— *v.* Williams, 987, 994
Willoughby's Charity, *In re*, 495
Wilmot *v.* Corporation of Coventry, 994
Wilson *v.* Hoare, 741, 742
——— *v.* Major, 205, 669
——— *v.* Wilson, 403
Wingfield's Case, 70
Windsor *v.* Farnham, 292
Winne *v.* Bampton, 994
Withnell *v.* Gartham, 565, 727, 728
Wood *v.* Day, 710
Woodcock *v.* Gibson, 32
Woodford *v.* Parkhurst, 62, 515
——— (Inhabitants of) *v.* Parkhurst, 298
Woolston's Case, 105, 106
Wrangham, *Ex parte*, 339
Wright *v.* Atkins, 142
——— *v.* Castle, 403
——— *v.* The School of Newport Pond, 698
——— *v.* Row, 210
——— *v.* Smythies, 130
——— *v.* Wright, 205, 210
Wych *v.* Meal, 442
Wynne *v.* Callander, 452
——— *v.* Hawkins, 141, 669

Y.

Yeovil (Poor of), *v.* Sutton, 698
Yordon's (or Jordeyn's) Charity, *In re*, 583
York (Dean and Chapter of) *v.* Middleburgh, 413, 681

TABLE OF STATUTES CITED.

HENRY III.

9, c. 36.—(To restrain alienations in mortmain) . . 5, 7

EDWARD I.

7, st. 2. *De religiosis* (the same) 6
13, c. 32. (To prevent evasion of statutes of mortmain by feigned recoveries) 13
13, c. 33.—(To prohibit tenants from setting up crosses) . . 15
13, c. 41, (To prevent alienation of lands belonging to religious houses) 4
18, c. 1.—(*Quia emptores*) 15
27, st. 2.—(Amortisement of lands) 35
34, st. 3.—(License in mortmain) 36

RICHARD II.

15, c. 5.—(To restrain conveyances to the use of religious houses) 16

HENRY V.

2, c. 1.—(Visitation of hospitals) 327

HENRY VIII.

23, c. 10.—(To prohibit conveyances to superstitious uses) 19, 74, 89, 93, 99, 104
23, c. 12.—(Appeals to the pope) 370
27, c. 28.—(Dissolution of smaller abbeys) . . . 19
31, c. 13.—(Dissolution of monasteries) . . . 20
33, c. 27.—(College elections) . . . 717
34 & 35, c. 5.—(Statute of wills) 244
37, c. 4.—(To vest chantries in crown) . . . 20

EDWARD VI.

1, c. 14.—(Vesting chantries, &c. in the crown) . 21, 93, 95, 96, 97

PHILIP AND MARY.

1 & 2, c. 8.—(Suspension of statutes of mortmain) . . 42

ELIZABETH.

5, c. 18.—(Lord Keeper) 279
13, c. 10.—(Leases by ecclesiastics) . . . 680, 681
18, c. 11.—(Leases of houses in cities by ecclesiastics) . . 680
31, c. 6.—(College elections) 718
35, c. 7, s. 27.—(Authorising conveyances for houses of correction &c.). 43
39, c. 5.—(Authorising the incorporation of hospitals) 44, 328, 681
43, c. 2.—(Binding apprentices) . . 781 n. (m) 804
43, c. 4.—(Statute of charitable uses), 60, 61, 69, 71, 72, 79, 82, 276, 280, 281, 287, 290, 292, 296, 306, 328, 514—516.

CHARLES II.

12, c. 12.—(Confirmation of judicial proceedings during protectorate) 279
13 & 14, c. 4.—(Schoolmasters) 728
13 & 14, c. 12, s. 5—(Corporations of workhouses in London, &c.) 49
15, c. 17.—(Incorporation of Bedford Level) . . 55
17, c. 3.—(Enabling impropriators to augment livings) . . 51
22, c. 6.—(Bodies politic enabled to purchase fee farm rents) . 55
29, c. 3.—(Statute of frauds) . . . . 145, 146, n.
29, c. 8.—(Augmentation of small livings) . . 73, 725

WILLIAM AND MARY.

1, stat. 1, c. 21.—(Lords commissioners) . . . 279
1, c. 8.—(Oaths by members of colleges) . . . 360
1, c. 18.—(Toleration act) 101, 102
4, c. 1.—(Land tax) 790
5 & 6, c. 20, s. 20.—(Authorising the incorporation of the Bank of England) 55

WILLIAM III.

7 & 8, c. 37.—(Crown enabled to grant licenses in mortmain) . 39
9 & 10, c. 32.—(Penalties for impugning the doctrine of the trinity) 102, 747, 760
9 & 10, c. 44.—(East India Company) . . 266 n. (v), 988
11 & 12, c. 4.—(Papists liable to punishment for keeping school) 109

ANNE.

2 & 3, c. 11, s. 4.—(Enabling governors of Queen Anne's Bounty to hold lands) 51
8, c. 9.—(Stamp on apprenticeship deeds) . . . 778
9, c. 20.—(Return to mandamus) 397

George I.

1, c. 13, ss. 12, 13.—(Oaths by members of colleges) . . 360
6, c. 18.—(Enabling the Royal Exchange and London Assurance Companies to hold lands) 56
9, c. 7, s. 12.—(Enabling churchwardens and overseers to purchase workhouses) 29, 726

George II.

2, c. 23.—(Taxation of Costs) 342
4, c. 28.—(Distress) 299
2, c. 29.—(Manchester College) 368
9, c. 36.—(Statute restraining gifts to charitable uses) 117—120, 247, 257, 259, 262, 265, 987
12, c. 31.—(Bath Hospital) 256
26, c. 22, s. 14.—(Incorporation of trustees of British Museum) 56

George III.

9, c. 31.—(Incorporation of Magdalen Hospital) . . 256
13, c. 78, repealed.—(General highway act) . . . 708
17, c. 53, s. 10.—(Purchase of parsonage houses) . 52, 685
19, c. 23.—(Bath Infirmary) 256
19, c. 44, s. 2.—(Exempting protestant dissenting schoolmasters from penalties) 102, 752
20, c. 28.—(Legacy duty) 773
21, c. 66.—(Repair of parsonage houses) . . . 685
22, c. 83, s. 21.—(Incorporation of workhouses) . . 49
23, c. 58.—(Legacy duty) 773
26, c. 58.—(Return of charitable donations) . . . 300
29, c. 51.—(Legacy duty) 773
31, c. 32, s. 13.—(Exemption of papists from penalties for keeping school) 109
36, c. 52.—(Legacy duty) 774, 777
38, c. 60.—(Land tax) 791
39, c. 73.—(Legacy duty) 774, 775
39 & 40, c. 41.—(Leases by ecclesiastics) . . . 685
41, c. 23, s. 9.—(Reimbursement of overseers) . . . 441
41, c. 109, s. 31.—(General inclosure) . . . 481
42, c. 99.—(Legacy duty) 776
42, c. 116.—(Land tax) . . . . 241, 791—793
43, c. 107.—(Queen Anne's Bounty) 52
43, c. 108.—(Gifts for building churches) . . 53, 241
44, c. 98.—(Stamp duty) 778
45, c. 84.—(Gifts for augmentation of small livings) . . 255
45, c. 101.—(Repeal of restriction as to number of livings to be held by colleges) 248
48, c. 55.—(Assessed taxes) 789
48, c. 149.—(Stamp duty) 778
51, c. 105.—(Enabling persons to give lands for benefit of Royal Naval Asylum) 47
51, c. 115.—(Grants by crown, &c. for building churches) . 54

52, c. 101.—(Summary remedy against abuses of charities), 401, 404, 481—483, 488, 490, 495, 510, 583, 651, 738
52, c. 102.—(Registration of charitable gifts) . . 302
53, c. 123.—(Land tax) 794, 795
53, c. 160.—(Partial repeal of 9 & 10 Will. III. c. 32, in favour of Unitarians) . . . 103, 106, n. (*m*), 745
55, c. 47.—(Return of charitable donations) . . . 301
55, c. 147.—(Exchange of parsonage houses, &c.) . . 52, 685
56, c. 139.—(Binding of parish apprentices) . . . 781
55, c. 184.—(Stamp act) . . 774, 775, 778, 779
57, c. 100.—(Land tax) . . . . 794—796
58, c. 45, s. 33.—(Church commissioners enabled to take lands) 54, 686
58, c. 59.—(Parish vestries) 732
58, c. 91.—(Appointment of charity commissioners) . . 305
59, c. 12, s. 8.—(Enabling churchwardens and overseers to build workhouses and enlarge them) . . . 30
59, c. 81.—(Appointment of charity commissioners) . . 307
59, c. 91.—(For facilitating applications to courts of equity) 308, 428, 496, 497

GEORGE IV.

3, c. 72, ss. 10, 11.—(Church building commissioners) 660, 661, 686
5, c. 58.—(Charity commissioners) 309
5, c. 39.—(Enabling the trustees of British Museum to hold lands, &c.) 57, 241
5, c. 103.—(Sites of churches, in whom to vest) . . . 55
7, c. 66.—(Conveyance of lands for parsonage houses) . . 52
9, c. 40, s. 25.—(County lunatic asylums) . . . 49, 785
9, c. 94.—(Resignation bonds) 716
10, c. 7, ss. 10, 12.—(Enabling papists to hold places under the crown) 110
10, c. 25.—(Enabling persons to give lands, and any interest therein, to Greenwich Hospital) 46

11 GEORGE IV. & 1 WILLIAM IV.

c. 60.—(Trustee act) . . . . . 498—505
c. 70.—(Abolition of Welsh jurisdiction) . . . 505
c. 74.—(Authorising the Royal Exchange and London Assurance Companies to purchase annuities) . . . 56

WILLIAM IV.

1, c. 21, s. 6.—(Costs of mandamus) 397
1 & 2, c. 34.—(Appointment of charity commissioners) . 309, 310
1 & 2, c. 58.—(Interpleader act) 398
1 & 2, c. 60, s. 39.—(Parish vestries) . . . 321
2, c. 57, s. 4.—(Enabling charity commissioners to appoint persons to receive rent charges) 316, 505
2 & 3, c. 45.—(Parliamentary reform) . 798 n. (*g*), 802, 803
2 & 3, c. 71.—(Prescription) 565
2 & 3, c. 80.—(Identification of lands of ecclesiastics) . 415, n. (*w*).
2 & 3, c. 115.—(Roman Catholic schools and places of religious worship) 70, 75, 112, 113, 115
3 & 4, c. 9.—(Incorporation of Seamen's Hospital Society) . 47

3 & 4, c. 27.—(Limitation of Actions) 563
3 & 4, c. 30.—Exemption of places of religious worship from rates) 784
4 & 5, c. 76.—(Poor law amendment) 51, 321
4 & 5, c. 88.—(Incorporation of London and Southampton Railway Company) 57
5 & 6, c. 30.—(Exchange of lands in common fields) . 685, 857 n.
5 & 6, c. 50.—(General highway act) . . 708, 709, 788
5 & 6, c. 69.—(Conveyance of Workhouses, &c.) . . 985
5 & 6, c. 71.—(Appointment of charity commissioners) 314—316, 430
5 & 6, c. 76.—(Regulation of municipal corporations) 323 n. 507, 672, 676—679, 726, 807

STATUTES CITED RELATING EXCLUSIVELY TO IRELAND (*a*).

10 Charles I. sess. 3, c. 1.—(For compelling the performance of charitable trusts) . . . . . 60 n. (*w*)
7 Will. III. c. 4.—(Papists prohibited from keeping schools) 110 n. (*b*)
21 & 22 Geo. III. c. 62.—(Repealing penalties on Roman Catholics) 110 n. (*b*)
32 Geo. III. c. 21, s. 15.—(Dispensing with license to papists) 110 n. (*b*)
40 Geo. III. c. 75.—(Charity commissioners in Ireland) . 263

PRIVATE STATUTES CITED.

14 Eliz.—(Tonbridge school) 553
30 Eliz.—(Tonbridge school) 554
17 Geo. III. c. 71.—(Rugby school) 639
39 Geo. III.—(Free Grammar School at Wotton-under-Edge) . 511
49 Geo. III. c. 18.—(Incorporated Clergy Orphan Society) . 984
59 Geo. III. c. 22.—(St. Catherine's hospital, Ledbury) . 508
4 Geo. IV. c. 38.—(Incorporation of St. George's Hospital, with power to hold lands, &c.) 48
6 Geo. IV. c. 56.—(Waddington Hospital). . . . 736
7 Geo. IV. c. 29.—(Bedford charity) 509
1 & 2 Will. IV. c. 17.—(Birmingham school) . 335 n. (n), 508

(*a*) See Table of Irish Statutes, *post*, pp. 889, 890.

CORRIGENDA.

P. 47, line 33, *for* Seaman's *read* Seamen's.
P. 55, n. (*i*) *for* 3 Geo. VI. *read* 3 Geo. IV. c. 72.
P. 73, line 5, *dele* s. 11.
P. 103, line 21, *before* still, *add* is.
P. 144, line 6, *after* devises, *add* of lands.
P. 170, line 32, *after* being, *add* of the parishes.
P. 219, line 10, *before* had, *add* the testatrix.
P. 283, line 26, *for* case *read* use.
P. 314, line 7, *for* has *read* have.
——— line 24, *after* to, *add* issue.
P. 352, *dele* the last line.
P. 393, line 26, *for* a *read* an.
P. 408, line 13, *for* it *read* them.
P. 453, n. (*q*) *for* 2 Sid. *read* 2 Id.
P. 455, line 28, *for* limitation *read* limitations.
P. 460, line 25, *dele* and.
P. 928, line 4, *for* real *read* such.

A

PRACTICAL TREATISE

OF

The Law of Mortmain,

&c. &c. &c.

CHAPTER I.

OF THE STATUTES RESTRAINING ALIENATIONS IN MORTMAIN, AND OF THE DISPENSATION WITH SUCH STATUTES.

SECT. I.—*Of the Statutes restraining Alienations in Mortmain.*

II.—*Of the different kinds of Corporations.*

III.—*Of Licenses to hold Lands in Mortmain.*

IV.—*Of the Dispensation with the Statutes of Mortmain in favour of particular Corporations.*

SECTION I.

Of the Statutes restraining Alienations in Mortmain.

THE great and increasing accumulation of property in the hands of monasteries and religious houses soon after the Conquest, and the consequent extension of the papal and ecclesiastical power in this kingdom, appear, by our historians, to have been viewed in the light of national grievances (*a*).

(*a*) 1 Rapin, 478, fol. ed.; Fuller's Hist. of the Church, book iii. 77; Ayliffe's Parergon, 376—378; Prynne's Hist. Edw. I. 236.

The restraints on alienations to bodies having perpetual succession, were originally imposed by the Legislature, to check the acquisition of lands by ecclesiastical bodies; and to secure to the lords of whom lands were holden, the incidents of the feudal tenures (*b*). Since the abolition of those tenures, the chance of escheat is the only material interest of such lords which is affected by alienations to corporate bodies.

The laws now in force, prohibiting corporations from holding lands, without license in mortmain, are founded upon the same policy as the rule against perpetuities—to prevent lands from being withdrawn from commerce and rendered unalienable.

Prohibitions of gifts in mortmain, though unknown to the lavish devotion of the new kingdoms, had been established by some of the Roman emperors, to check the overgrown wealth of the hierarchy (*c*). It is said, that about the third century, laws were made by one of the Christian emperors, to prevent the mischief of mortmain (*d*). The first attempt at a limitation of this description in modern times, was made by Frederick Barbarossa, who, in 1158, enacted, that no fief should be transferred, either to the church or otherwise, without the permission of the superior lord. Louis IX. inserted a provision of the same kind in his establishments (*e*).

Alienation in *mortmain, in mortuâ manu,* is an alienation of lands or tenements to any corporation, sole or aggregate, ecclesiastical or temporal. But these purchases having been chiefly made by religious houses, in consequence whereof the lands became perpetually inherent in one dead hand, this hath occasioned the general appellation of mortmain to be applied to such alienations, and the religious houses themselves to be principally considered in forming the statutes of mortmain (*f*). Lord Coke, after mentioning the conjectures of others, upon the origin of the term (*g*), says, that the true

(*b*) See 1 Reeves's Hist. 240.

(*c*) Giannone, l. iii.

(*d*) 1 Ves. sen. 223.

(*e*) Ordonnances des Rois, 213—303; Amortisement in Denisart and other French law books; Du Cange *Manus mortua;* Fleury Instit. au droit, t. i. 350; Hallam's Midd. Ages, vol. ii. 320, 8vo. ed.

(*f*) 2 Bl. Comm. 268.

(*g*) Some have said, that it is called mortmain, *manus mortua, quia pos-*

cause and meaning thereof was taken from the effects, as it is expressed in the statute itself (*h*), that the services that were due out of such fees, and which in the beginning were created for the defence of the realm, were unduly withdrawn, and the chief lords did lose their escheats, wardships, reliefs, and the like; so as the lands were said to come to dead hands as to the lords, for that a dead hand yieldeth no service (*i*).

Mr. Justice Blackstone observes (*j*), that of the conjectures offered by Sir Edward Coke, the one that seems most probable is, that these purchases being usually made by ecclesiastical bodies, the members of which (being professed) were reckoned dead persons in law; land, therefore, holden by them, might, with great propriety, be said to be held *in mortuâ manu*.

In the Scotch law, the terms *mortification* or mortmain are nearly synonymous. Feudal subjects granted in donation to churches, monasteries, or other corporations, for religious, charitable, or public uses, are said to be given in mortmain, or to be mortified; either because all casualties must necessarily be lost to the proprietor, where the vassal is a corporation, which never dies (*k*); or because the property of these subjects is made over to a dead hand, which cannot, contrary to the donor's intention, transfer it to another (*l*). The grant of lands to religious houses in Scotland, was prohibited at a remote period (*m*).

Ecclesiastical bodies were incorporated from the earliest

sessio eorum est immortalis, manus pro possessione, et mortua pro immortali; and the rather for that, by the laws and statutes of the realm, all ecclesiastical persons are restrained to alien. Others say, Spelm. Gloss. *Manus mortua*, that it is called *manus mortua per antiphrasin*, because bodies politic and corporate never die. Others say, that it is called mortmain by resemblance to the holding of a man's hand that is ready to die, for what he then holdeth he letteth not go till he be dead. Co. Litt. 2 b. So that an inheritance is supposed to remain in men of religion as long as the house itself continues. Plowd. 193.

(*h*) 7 Edw. I. stat. 2. c. 1.

(*i*) Co. Litt. 2 b.

(*j*) 1 Bl. Comm. 475.

(*k*) Craig, Lib. i. Dieg. 10, s. 35.

(*l*) Ersk. Inst. book ii. tit. 4, s. 10.

(*m*) Second stat. Rob. I. c. 1, Regiam Majestatem, 27; Merewether and Stephens's Hist. Corp. 333.

times; the perpetual succession of such bodies of colleges and chapters, is expressly recognized in Fleta (*n*); but there was then no application of that doctrine to the aggregate municipal corporations of burgesses (*o*).

The doctrine of taking lands to religious persons by *perpetual succession*, preventing all chance of escheat, was known in the time of Edward I., and had then acquired the term of mortmain. But it does not appear that such doctrine had then been applied to cities or boroughs—perhaps upon the ground that they were granted for the public good, and that the king as the chief lord concurred in the grant, thereby consenting to the waiving of the escheat, as required by the stat. 34 Edward I., st. 3; and therefore, although the same effect was produced by the grant in perpetuity to the inhabitants, the same practical inconvenience did not arise from it, nor was it at that time considered a grant in mortmain (*p*).

By statute Westminster 2 (*q*), a regulation was made for preserving to religious societies the property they had obtained. If, says the act, abbots, priors, keepers of hospitals, and other religious houses, founded of the king or his progenitors, alien lands given to their houses by him or his progenitors, the land shall be taken into the king's hands, to be holden at his will, and the purchaser lose both the lands and the purchase money; and if the house were founded of any common person, the heir of the founder was entitled to have a writ *contra formam collationis;* so also of lands given for the maintenance of a chantry, or light in a church, or chapel, or other alms, if the land was aliened (*r*).

According to the strictness of the feudal system, a vassal could not alienate his fief without the consent of his lord; but this consent was not more necessary in the case of an alienation to a religious house, than in that of an alienation to a common person; and when this strictness began to be relaxed in the latter case, it seems to have been equally

(*n*) Lib. vi. c. 18.

(*o*) Merewether and Stephens's Hist. Corp., Int. xxv.

(*p*) Merewether and Stephens's Hist. Corp., 489, 490, 702.

(*q*) 13 Edw. I. c. 41.

(*r*) 2 Reeves's Hist. 156.

relaxed in the former: for Bracton tells us, that "a gift might be made to *religious men* as well as to others who were capable of a gift, unless the owner of the land was restrained from alienating them, by an express exception to his power of alienation, in the charter by which he held the land;" and he adds, that no reason or necessity induced a prohibition with respect to them, except the form of the original gift (*s*). On the relaxation of the feudal restraints on the power of aliening lands, the owner was at liberty to give a reasonable portion to any religious house (*t*).

Clauses in conveyances prohibiting the alienation of lands to the religious, of which Lord Coke states (*u*) that he had seen many, appear to have been the first restraints imposed on alienations in mortmain.

The first legislative enactment against such alienations in England, is contained (*v*) in Magna Charta, 9 Henry III. c. 36., re-enacted 25 Edward I. c. 36., which provides, "that it shall not be lawful from henceforth to any to give his lands to any religious house, and to take the same land again to hold of the same house. Nor shall it be lawful to any house of religion to take the lands of any, and to lease the same to him of whom he received it. If any from hence-

(*s*) Item fieri poterit donatio, tam viris religiosis quam aliis quibus dari poterit, nisi modus donationis inducat contrarium; scilicet quod licitum sit donatorio rem datam dare vel vendere cui voluerit, exceptis viris religiosis: et quod talibus personis dari non poterit sicut aliis, nulla ratio vel necessitas illud inducit nisi tantum modus donationis. Bract. fol. 13. a. v. finem. Lib. 1. fol. 13. Bracton (lib. 2. c. 10.) thus mentions ancient grants in liberam eleemosynam. *Poterit etiam fieri donatio in liberam eleemosynam, sicut ecclesiis cathedralibus, conventualibus, parochialibus, viris religiosis et quandoque; in liberam eleemosynam et perpetuam, et quo casu, non excusatur ille qui accipit à præstatione servitii. Si autem fiat donatio in liberam* puram et *perpetuam eleemosynam* excusatur. See Litt. lib. 2. s. 135.

(*t*) Staunf. Pr. Reg. Alienation without license.

(*u*) 2 Inst. 75. Such conditions are mentioned by other writers. Tenenda sibi et hæredibus suis, vel cuicunque dare vel assignare voluerint exceptis viris religiosis et judæis. See Cowell, Kennett, Par., Antiq, Glossary *religiosi*.

(*v*) 2 Inst. 75; Wilmot's Notes, 9; Wood's Inst. 301.

forth give his land to any religious house, and thereupon be convict, the gift shall be utterly void, and the land shall accrue to the lord of the fee."

The religious houses and regular (*w*) clergy, who, Lord Coke observes (*x*), were to be commended for always having of their counsel the most learned men in the law, found many ways of evading this statute, by purchasing lands holden of themselves, by taking leases for long terms of years, and by other devices.

In order to prevent such evasions, the statute 7 Edward I., st. 2, called the Statute *de Viris Religiosis*, was passed; by which, after reciting that of late it had been provided, that religious men should not enter into the fees of any without license and will of the chief lord of whom such fees were holden immediately: and notwithstanding, such religious men had entered, as well into their own fees as into the fees of other men, appropriating and buying them, and sometime receiving them of the gift of others, whereby the services that were due of such fees, and which at the beginning were provided for defence of the realm, were wrongfully withdrawn, and the chief lords did lose their escheats of the same: "It is provided, that no person, religious or other, whatsoever he be, (that will buy or sell any lands or tenements, or under the colour of gift or lease, or that will receive by reason of any other

(*w*) 2 Inst. 75; See Fleta, lib. iii. c. 5.

(*x*) Ecclesiastical persons were formerly divided into *regular* and *secular*; the former included all abbots, priors, and members of religious houses, and were called regular, because they lived under certain rules, and had taken vows of true obedience, perpetual chastity, and wilful poverty. Bishops, deans and chapters, archdeacons, prebends, parsons and vicars, who did not live under the rules of the other orders, and performed spiritual offices to the laity, and took upon themselves the cure of souls, were called *secular*, to which class all ecclesiastical persons now belong. Co. Litt. 93 b; Burn's Eccl. Law, tit. *Monasteries*, s. 3; Ersk. Inst. by Ivory, 98, 99. See the preface to Tanner's *Notitia Monastica*; where the gradual progress of the monkish institutions is accurately marked, and an account given of the number of religious foundations in each reign from the Conquest; and it appears, that most of the houses of monks, nuns and canons, were established within 150 years of that event, or before the first year of the reign of Henry III., though many churches, friaries,

title, whatsoever it be, lands or tenements, or by any other craft or engine,) will presume to appropriate to himself under pain of forfeiture of the same, whereby such lands or tenements may anywise come into mortmain. We have provided also, that if any person, religious or other, do presume, either by craft or engine, to offend against this statute, it shall be lawful for us and other chief lords of the fee immediate, to enter into the land so aliened, within a year from the time of the alienation, and to hold it in fee as an inheritance. And if the chief lord immediate be negligent, and will not enter into such fee within the year, then it shall be lawful to the next chief lord immediate of the same fee to enter into the same land within half a year next following, and to hold it as before is said: and so every lord immediate may enter into such land, if the next lord be negligent in entering into the same fee, as is aforesaid. And if all the chief lords of such fees, being of full age, within the four seas and out of prison, be negligent or slack in this behalf for one whole year, we immediately after the year accomplished from the time that such purchases, gifts, or appropriations happen to be made, shall take such lands and tenements into our hand, and shall enfeoff other therein, by certain services to be done to us for the defence of our realm; saving to the chief lords of the same fees their wards and escheats, and other services thereunto due and accustomed."

It is stated by Lord Coke (*y*), that bishops, parsons and other ecclesiastical persons *secular*, were considered not to come within the statute 9 Henry III.; they are, however, expressly included in this act, the words of which are, that no religious person, or other, whatsoever he be (*z*): and therefore an alienation without license, to a parson or vicar, and his successors, by which they will take in right of the church, is an alienation in mortmain (*a*). Although it is said, that a vicarage might have been endowed without the consent of the king (*b*).

hospitals and colleges were subsequently founded.

(*y*) 2 Inst. 75.

(*z*) Co. Litt. 2 b.

(*a*) Bro. Mortmain, pl. 3. Vin. Abr. Mortmain (B), pl. 6.

(*b*) Id. pl. 23; *Cope* v. *Bedford*, Palm. 427.

Notwithstanding this statute, grants to corporations without any license in mortmain, are good, for the purpose of vesting the lands in the grantees; for corporations, without such license, have capacity to take, but not to retain. The penalty for such an alienation is forfeiture to the immediate lord, or on his default, to the king, to whom a right of entry was given. This remark does not apply to conveyances to corporations for charitable uses within the statute 9 Geo. II. c. 36, which renders such as are not conformable to its provisions void.

As to things not lying in tenure, as rents, commons, and the like, the king is entitled to have them, if aliened in mortmain immediately after office found; and until office found, they remain in the corporation (*b*).

Under the stat. 7 Edward I. it was held, that if there were a lord, and an abbot tenant, and the lord released to the abbot his seignory, this was mortmain, and the lord paramount should have the seignory by force of the statute (*c*). So, a grant of a rent charge to an abbot and his successors, even for a term of 80 years, was mortmain under this statute, for the words are not confined to lands, but prohibit the alienation of lands and tenements (*d*). Although it was argued in a recent case (*e*), that tithes were neither within this act, nor the statute 15 Richard II. c. 5, the object of those statutes being to prevent the inheritance of *lands* from getting into the hands of religious houses.

An alienation by one abbot to another was within the statute (*f*); so an appropriation of an advowson of which an abbot or bishop was seised in fee, in his own right, to him and his successors, was mortmain (*g*). So, if an abbot, or a dean and chapter, had a rent in fee issuing out of lands, and the tenant of the lands had granted by deed, that they and their successors should distrain for that rent in *other* lands, this

(*b*) Plowd. 502; Co. Litt. 2 b.

(*c*) Fitz. N. B. 223 (I), cited 7 Rep. 38 a.

(*d*) Fitz. N. B. 223 (B); Vin. Abr. Mortmain (B), pl. 14.

(*e*) *Jesus College* v. *Gibbs*, 1 Younge & Collyer, 147; See Wood's Inst. 301.

(*f*) Vin. Abr. Mortmain (B), pl. 2.

(*g*) Fitz. N. B. 223 (H).

was construed to be within the act (*h*). The entry by an abbot or prior on the lands of his villain without license, incurred a forfeiture in mortmain (*i*). The statute extends as well to lands given to bodies politic, as to those purchased by them (*k*). Notwithstanding the statute, a citizen and freeman of London, may by custom devise lands in mortmain (*l*), because by subsequent statutes their customs were confirmed (*m*), but such custom is confined to lands in London (*n*).

The taking a lease for a very long term, as 100 or 200 years, is within the mortmain act, but a term for 20 or 40 years, or even for 99 years appears not to be contrary to the statute (*o*). In a recent case (*p*), it seems to have been admitted, that a mere common husbandry lease taken by a religious body is not within the statute; and it may be inferred, that a mere *covenant* for renewal, would not make it so (*q*). It is said, that the plaintiff in replevin shall not be suffered to disclaim against an abbot, or other religious person, nor against their bailiff, by reason of mortmain (*r*).

The grant of goods and chattels is not within the mortmain acts (*s*). The material distinction between an annuity and a rent is, that the former is a charge on the *personal* estate only, the latter on the real (*t*). An annuity therefore does not fall within the prohibitions against mortmain, because it charges the person only (*u*).

(*h*) Fitz. N.B. 224 (G).

(*i*) Id. 224 (D).

(*k*) Id. 224 (F); 9 Mod. 202, 177.

(*l*) Doct. & Stud. c. 10; Bridg. 103; Bro. Customs, 41, 7; Roll. Abr. 556; 8 Rep. 129 a.

(*m*) 2 Bulstr. 187; See 23 Hen. VIII. c. 10, s. 5; Norton's Comm. on London, 449—452.

(*n*) *Middleton* v. *Cater*, 4 Br. C. C. 409.

(*o*) 3 Edw. IV. fol. 13, 14; 4 Hen. VI. fol. 9, pl. 1; Bro. Mortmain, pl. 27, 39; Vin. Abr. Mortmain (B), pl. 21; Godb. 192; Rep. of Sir O. Bridg. 7.

(*p*) *Jesus College* v. *Gibbs*, 1 Younge & Collyer, 147.

(*q*) Bro. Mortmain, pl. 39; Vin. Abr. Mortmain (B), pl. 22.

(*r*) Bro. Mortmain, pl. 2, cites 28 Hen. VI. c. 10; Vin. Abr. Mortmain (E), pl. 1.

(*s*) Kitch. on Courts, 139 b.

(*t*) Co. Litt. 2 a., 144 b., 20 a.; Com. Dig. *Annuity* (A); Terms de la Ley, Annuitie; Dyer, p. 24. See *Priddy* v. *Rose*, 3 Mer. 86; *Earl of Holderness* v. *Lord Carmarthen*, 1 Br. C.C. 377; *Earl of Stafford* v. *Buckley*, 2 Ves. sen. 171; *Aubin* v. *Daly*, 4 Barn. & Ald. 59.

(*u*) Co. Litt. 2 b; Vin. Abr. Mortmain (B), pl. 17; 2 Bl. Comm. 40.

The lord must enter for a forfeiture on an alienation in mortmain within a year (*v*), which is to be computed from the day next after the alienation (*w*). But where lands are conveyed to the use of a party for life, with remainder to a corporation, the forfeiture does not accrue until the death of the tenant for life (*x*). And where a remainder-man aliens in mortmain, the lord cannot enter until the determination of the particular estate (*y*). The right of the lord to enter continued only for one year, and where the seignory was limited for particular estates, the lord in remainder was bound by the laches of the particular tenant, in not entering within the year (*z*). But descent within a year after the alienation in mortmain did not take away the right of entry within the year. So on an alienation of an advowson in mortmain, the king or other lord may present on the next avoidance within the year, though the church had been full six months before the *quare impedit* was brought (*a*).

The heir of a tenant in tail who had aliened in mortmain, was not barred, the statute *de donis* (*b*) having passed after the statute of mortmain (*c*).

The king cannot enter upon lands aliened in mortmain before office found (*d*).

The inquiry whether lands have been aliened in mortmain, is directed by commission under the great seal addressed to special commissioners, who are empowered to summon and examine witnesses, and to take an inquisition with a jury, which is to be returned into the Court of Chancery (*e*).

(*v*) Plowd. 202.

(*w*) Vin. Abr. Mortmain (C) 3, pl. 5.

(*x*) Vin. Abr. Mortmain (B), pl. 19, (C), pl. 6.

(*y*) Id. (C) 3, pl. 4.

(*z*) Vin. Abr. Mortmain (C) 3, pl. 1, 2.

(*a*) Id. pl. 3.

(*b*) 13 Edw. I. c. 1.

(*c*) Bro. Mortmain, pl. 10; Vin. Abr. Mortmain (C), pl. 2; Plowd. 238.

(*d*) See *Doe* d. *Hayne* v. *Redfern*, 12 East, 96; *Doe* d. *Evans* v. *Evans*, 5 Barn. & Cr. 587, note (*e*); *S. C.* 8 Dowl. & Ryl. 399.

(*e*) A commission of this kind was issued in Dec. 1833, directed to five commissioners who were barristers, including the solicitors of the Treasury. The Commission recited letters patent of the 28th June, in 7 Geo. IV. constituting an insurance society a body politic, by the name of "The

The subject has a general right to traverse every inquisition finding property to be in the crown (*f*); but it may be

University Life Assurance Society," with power to purchase and hold lands, &c., not exceeding in value in the whole, the annual sum of 1000*l*., and any goods and chattels, whether absolutely or by way of mortgage, pledge, or annuity, of what nature or kind soever, for the benefit of such society: that the king had been informed that the said society had taken by purchase, gift, grant, or other conveyances or assurances in the law, unto or to the use of, or in trust for the said society, and their successors, or for term or terms for years, or other estate therein, divers manors, &c. in the county of Suffolk: the said society having, under the powers given to them by the said letters patent, taken and purchased, or become seised, or possessed, to them and their successors, of divers other lands, &c. in the United Kingdom, of the annual value of 1000*l*., and being seised or possessed thereof, before, and at, and after the time of such purchase, gift, grant, or other conveyances or assurances of such manors, &c. in the county of Suffolk, whereby the said manors, &c. so purchased, &c. had from the time or respective times of the purchase, gift, grant, conveyance, or assurance thereof, as aforesaid, come into mortmain, and become forfeited, and then did belong to the king, and the crown of the United Kingdom, by virtue of the prerogative royal. The commission then authorized any three or more of the commissioners named, to inquire by the oaths of a jury, and, if necessary, by the examination of witnesses upon oath, (which the commissioners were authorized to administer,) and by other means, whether the society had, by themselves, or by any persons in trust for, or for their use, purchased, or become seised of, or entitled unto any and what manors, &c. in the county of Suffolk, by the gift or grant of any person or persons whomsoever. And whether the said society had, before and at the time of such purchase under the powers given to them by the said letters patent, purchased, or become seised, or possessed, and still remained seised and possessed to them and their successors, of divers other lands, &c. in the United Kingdom, of the annual value of 1000*l*.; and by what deeds or conveyances the said society became seised or possessed of the said manors, &c. in the county of Suffolk, and how much the same were worth by the year, according to the true value thereof, and to what amount, and of what person or persons, and by what services, the said manors, &c. in the county of Suffolk were holden, and if the same were holden of any chief lord or others lords immediate of the fee, other than the king; then, whether such chief lord or other lords, had, within any and what time after such purchase, &c. of the said manors, &c. in the county of Suffolk, entered into the same, and what part thereof; and whether the same had become forfeited, and then did belong to the king in right

doubted, whether a mere trustee has a right to do so (*g*). Leave to traverse an inquisition may be obtained, upon petition to the Court of Chancery (*h*).

In order to evade the statute 7 Edward I., the religious houses used to set up a fictitious title to the lands intended to be given or sold, and brought an action against the tenant to recover them; the tenant, by collusion, made no defence, whereby judgment was given for the religious house, which then recovered the lands by sentence of law, upon a supposed prior title. And although proceedings of this kind were carried on by a species of conventional fraud, between the religious house and the tenant of the land, yet the judges held, that in these cases the religious communities did not appropriate such lands *per titulum doni vel alterius alienationis*, as the statute *de religiosis*, 7 Edward I. expresses it;

of his crown, or of any and what other right; and who had received the mesne profits thereof, from the time or times of the purchase, &c. and to what amount, and in whose possession the same then were; and also all other matters and things which they should judge necessary to be inquired of, touching the premises. And all and every the manors, &c. which, by inquisition to be taken in that behalf, should be found to have been purchased by, or given, &c. unto, or to the use of, or in trust for the said society, and which unto the king ought to devolve, to take and seize into the hands of the king. It then commanded the commissioners to take an inquisition, and to certify the same into Chancery under the seals of three or more of them, and gave them power to summon witnesses, &c. It then commanded the sheriff of the county of Suffolk to summon a jury, who were to inquire into the truth of the matter. By an inquisition taken the 6th January, 1834, under the hands and seals of three commissioners and twelve jurymen, it was found, that by several indentures of mortgage, and demise, and in fee, therein mentioned, the first of which was dated the 23rd February, 1829, that several manors and other estates, in Suffolk, had been conveyed to the society and their successors by way of mortgage, that such estates were holden of his majesty in free and common soccage, in right of the crown, but not subject to any services or rent except fealty, and that the premises had become forfeited, and then did belong to his majesty in right of his crown. And the commissioners certified, that they had seized the lands forfeited into the hands of his majesty.

(*f*) Com. Dig. Prerog. (D), 83, 84; *Ex parte Lord Gwydir*, 4 Madd. 322.

(*g*) *In re Sadler*, 1 Madd. 581.

(*h*) *Ex parte Webster*, 6 Ves. 609.

and that they were not within the words, *aut alio quovismodo arte vel ingenio.* For as recoveries were prosecuted in a course of law, they were presumed to be just; and it was accordingly held, that they were not within the statute (*i*). Thus originated common recoveries, which, for a long series of years, were one of the principal assurances, by tenants in tail, of lands in this kingdom, and have only recently been superseded by a more simple mode of conveyance (*k*).

To meet this device of the ecclesiastics, the statute of the 13th Edward I. c. 32 (*l*), was passed; by which it is stated, that when religious men, and other ecclesiastical persons, did implead any, and the party impleaded made default, whereby he ought to lose the land, forasmuch as the justices had thought hitherto, that if the party impleaded made default by collusion, that where the demandant, by occasion of the statute, could not obtain seisin of the land by title of gift, or other alienation, he should now by reason of the default, and so the statute was defrauded; it was enacted, "that in this case, after the default made, it shall be inquired by the country, whether the demandant had right in the thing demanded or not; if it was found that he had right, judgment should pass for him, and he should recover seisin; and if he had no right, the land should accrue to the next lord of the fee, if he demanded it within a year from the time of the inquest taken; and if he did not demand it within the year, it should accrue to the next lord above, if he demanded it within half a year after the same year; and so every lord, after the next lord, should have the space of half a year to demand it, successively, until it came to the king, to whom at length, through default of other lords, the lands should accrue. And to challenge the jurors of the inquest every of the chief lords of the fees should be admitted, and likewise for the king, they that would should challenge; and that after judgment given, the land should remain clear in the king's hands, until it were deraigned by the demandant, or some other chief lord; and the sheriff should be charged to answer

(*i*) 2 Inst. 429; Plowd. 43.
(*k*) 3 & 4 Will. IV. c. 74.
(*l*) Statutes of the Realm, vol. i. 87.

for it at the Exchequer." All actions brought for the recovery of any lands or tenements, wherein a freehold, inheritance, or a long term of years, was recovered, were within this act, as a *præcipe quod reddat, quare impedit*, ejectment fine, execution on an elegit or statute merchant, or of the staple (*m*).

In consequence of the last statute, a judicial writ was framed, called *quale jus*, which lay where an abbot, prior or such other, sought to have judgment to recover land by the default of the tenant against whom the land was demanded; in which case, before judgment was given or execution awarded, this writ was directed to the escheator, to inquire what right the party had to recover; and if he found that he had no right, then the lord might enter, as for an alienation in mortmain. After reciting the recovery, and the suspicion of fraud, it commanded the escheator or sheriff to return a jury, to inquire what right the religious person had in the tenements recovered; which of his predecessors had been seised of them, as in right of the church; and what was the annual value. The sheriff was, in the mean time, commanded to seize the tenements in question into the king's hands, and to answer for the issues at the Exchequer; and to give notice to the chief lords, mediate and immediate, of the fee, that they might attend, if they thought proper, at the inquest to be taken (*n*).

About the beginning of the twelfth century, two religious orders were established, under the name of Knights Templars and Knights Hospitallers, and soon acquired large possessions and revenues all over Christendom, but more especially in England. The knights of both orders enjoyed great privileges, as well against the king as against the other lords—as to be free from tenths and fifteenths—to be discharged of purveyance—not to be sued for any ecclesiastical cause before the ordinary, but before the conservators of their own privileges—to give sanctuary to felons, &c. (*o*) The knights being distinguished by the sign of the cross, it became a

(*m*) 2 Inst. 429.
(*n*) Reg. Judic. 16, 17; 2 Inst. 429; Gibs. Cod. 667.
(*o*) Gibs. Cod. 668.

practice with their tenants to erect crosses on their houses and lands, that their privileges might not be invaded. The tenants of other lords, in order to participate with them in their advantages, began to set up crosses on their lands and houses, as if they had also been tenants of these orders (*p*).

The statute 13 Edward I. c. 33, after stating, forasmuch as many tenants set up, or caused to be set up, crosses in their lands, in prejudice of their lords, that tenants should defend themselves against the chief lords of the fee, by the privileges of templars and hospitallers; ordained, that such lands shall be forfeited to the chief lord, or to the king, in the same manner as is provided for lands aliened in *mortmain*.

In consequence of the injury which the lords sustained from subinfeudation, or a grant to hold of the grantor, as a mesne lord; it was provided by the statute 9 Henry III. c. 32, that no man should either give or sell his land, without reserving sufficient to answer the demand of his lord; but that act did not altogether prevent subinfeudation, even where the grantor held immediately of the crown; and afterwards by the statute of *quia emptores*, 18 Edward I. c. 1., it was declared, "that from thenceforth, it should be lawful to every free man to sell at his own pleasure his lands and tenements, or part of them; so that the feoffee should hold the same lands and tenements of the chief lord of the same fee, by such service and customs as his feoffor held before." This statute contained a provision against alienations in mortmain in these words: "And it is to be understood, that by the said sales or purchases of lands or tenements, or any parcels of them, such lands or tenements shall in no wise come into mortmain, either in part or in whole, neither by policy nor craft contrary to the form of the statute made thereupon of late."

Between the time of Edward I. and Richard II., it had become a common practice with religious persons, parsons, vicars and other *spiritual* persons, to enter by the assent of the tenants into lands which adjoined to their churches, to convert them into church yards, and to consecrate them for

(*p*) 2 Inst. 431, 432; 2 Reeves's Hist. 157.

burying places, by virtue of bulls from the pope, without license from the king or chief lords. By which means they purchased considerable property in mortmain (*q*). It was therefore declared, by statute 15 Richard II. c. 5., that such practice was manifestly within the compass of the statute *de religiosis* (*r*).

The next expedient resorted to by the ecclesiastics, to elude the statute of mortmain, was the adoption from the Roman law, of the distinction between the possession of land, and the use or beneficial interest, by obtaining grants not directly to, but to the *use* of, their religious houses and their successors, by which they took the profits (*s*). The clerical chancellors who presided at that time, assumed a power of compelling the feoffees to perform the trust which had been reposed in them; by which means the same inconveniences were soon felt by the king and lords, as would have followed from direct alienations in mortmain. To remedy this abuse, it was enacted by the same statute, 15 Richard II. c. 5 (*t*), that within a limited time, all those who were then possessed by feoffment, or by any other means, of lands and tenements, fees, advowsons, or possessions of any other kind whatever, to the *use* of *religious* people, or other spiritual persons, should either regularly convey them in mortmain by the license of the king and of other lords, or that they should, within the time limited, sell them to some other use, under the penalty of their being forfeited to the king and the lords respectively, according to the provisions of the statute *de religiosis* (*u*). And under the same penalty it was enacted, that from thenceforth, no such purchase should be made, so that such *religious* or other *spiritual* person should enjoy the profits.

All the statutes of mortmain hitherto made, relate only to ecclesiastical corporations; civil corporations began now, however, to attract the public attention, and the same incon-

(*q*) See 3 Reeves's Hist. 168, 169.

(*r*) 7 Edw. I. stat. 2, *ante*, p. 6.

(*s*) 2 Inst. 75; 1 Sand. Uses, 16, 17, 4th ed.

(*t*) This statute only extends to uses in favour of corporations. Bacon on Uses, 28.

(*u*) 7 Edw. I. stat. 2, *ante*, p. 6.

veniences to be felt from the appropriation of land or tenements by them, as by the former.

It was therefore enacted by the statute 15 Richard II. c. 5, that the same statute should extend and be observed of all lands, tenements, fees, advowsons and other possessions, purchased, or to be purchased, to the use of guilds or fraternities; and moreover it was assented, "because mayors, bailiffs, and commons of cities, boroughs, and other towns, which have a perpetual commonalty, and others which have offices perpetual, be as perpetual as people of religion; that from henceforth they shall not purchase them, and to their commons, or office, upon pain contained in the said statute *de religiosis*; and whereas others be possessed, or hereafter shall purchase to their use, and they thereof take the profits, it shall be done in like manner as is aforesaid of people of religion."

From this statute it is evident, that the doctrine of mortmain did not before apply even to guilds or fraternities; and still less to mayors, bailiffs, and commons of cities and boroughs, and other towns which are stated to be perpetual bodies; but it is obvious, that they were only considered as such by natural succession, and not by any artificial notion of a body corporate or politic. And this enactment has been quoted in confirmation of the position adopted in a recent learned work, that there were no municipal corporations recognized before this period, although the cities and boroughs are not described as being incorporated (*v*).

Another device practiced by ecclesiastics, was to get their villains to marry free women who had inheritances, so that the lands might come to their hands by the right which the lord had over the property of his villain. The Commons in the 17th year of Richard II., petitioned, that remedy might be had against "such religious persons as cause the villains to marry free women inheritable, whereby the lands come to those religious hands by collusion;" the answer given was, that sufficient remedy was provided by the statute, which, however, had been already found ineffectual in other instan-

(*v*) Merewether & Stephens's Hist. Corp. 728.

ces that appeared entitled to the same construction (*w*). It is said that if the villain of an abbot or prior purchased lands or tenements in fee, the abbot or prior could not enter into them without the king's license, and that if he did, it was mortmain, but it was otherwise where the villain had the lands by descent (*x*).

Only a spiritual body politic or corporate, having perpetual succession, was capable of an appropriation; the effect of which was to create a perpetual incumbent, with all the temporal rights of the benefice and cure of souls, and therefore originally appropriations were made to abbots, priors, deans, prebendaries, and such others as could perform divine service. But in progress of time, appropriations were made to bodies consisting of a number of persons, as deans and chapters, and nuns, who could not minister the sacraments nor perform divine service; and a vicar was appointed to perform divine service, to whom a small portion of the revenues was allotted, and they to whom the appropriations were made, retained the principal part of the revenue without performing any service for it. An appropriation could not be made without the consent of the king, the patron, and the ordinary; the pope was formerly considered supreme ordinary, and made appropriations without the bishop, who was only deemed inferior ordinary (*y*). To remedy some inconveniences which had been felt by parishioners from the appropriation of benefices by religious houses, it was provided by the next chapter of the same statute (*z*), that in every license for the future to be made in Chancery for the appropriation of any parish church, it should be expressly provided, that the diocesan of the place should appoint, according to the value of the church, a convenient sum of money to be paid and distributed yearly, of the fruits and profits of the same church, by those to whom the appropriation was made, and their successors, to the poor parishioners of such church;

(*w*) Cott. Abr. 355; See Merewether & Stephens's Hist. Corp. 772, 773.

(*x*) Fitz. N. B. 224 (B) and n. (*a*).

(*y*) Plowd. 496, 497; Wats. Cl. L. 185, 191.

(*z*) 15 Rich. II. c. 6, 4 Hen. IV. c. 12; Wats. Cl. L. 194—202.

and that the vicar should be well and sufficiently endowed. An abbot or bishop could not appropriate an advowson of which they were seised in fee, or had license to purchase, without the king's license, as it was considered an alienation in mortmain (*a*).

Some gifts of land, not within the statutes of mortmain, having very much increased, it was thought expedient to restrain such alienations, as equally prejudicial to the community with those in mortmain. By statute 23 Henry VIII. c. 10 (which is the first act against superstitious uses), all assurances and trusts of lands to the use of parish churches, chapels, church-wardens, guilds, fraternities, commonalties, companies or brotherhoods, erected and *made of devotion, or by common assent of the people, without any corporation*, or to uses to have obits perpetual, or a continual service of a priest for ever, or for 60 or 80 years, were declared to be within the mischiefs of alienations in mortmain, and to be utterly void as to such gifts as were made after the 1st of March in that year, for any term exceeding twenty years from the creation of such uses. And all collateral acts and assurances for evading the provisions of that act, are declared to be utterly void. But there is a saving in favour of such cities and towns corporate, as by their ancient customs have power to devise in mortmain (*b*).

It appears from this statute, that aggregate bodies did and could take in perpetual succession, without being incorporated; that doctrine being impliedly asserted, by lands being assumed to be held in mortmain when granted by common assent of the people, without any corporation (*c*).

The property which had got into the hands of the religious houses and monasteries, was appropriated by Henry VIII. to his own purposes (*d*); and by statute 27 Henry VIII. c. 28, all monasteries, priories, and other religious houses of monks, canons, and nuns, which had not lands, tenements, rents, tithes, portions, and other hereditaments, above the clear

(*a*) Fitz. N. B. 223 (H); 11 Rep. 11. Hist. Corp. 1098, 1728.
(*b*) See *Porter's* case, 1 Rep. 22 b. (*d*) See Camd. Britt. Intr. 171
(*c*) Merewether and Stephens's (191); Tann. Not. Mon. Pref. 37—39.

yearly value of 200*l.*, together with all the possessions of such religious houses, were given to the king, his heirs and assigns for ever: the monasteries dissolved by this act are usually called the smaller abbeys.

By the statute 31 Henry VIII. c. 13, all monasteries, priories, nunneries, colleges, hospitals, houses of friars and other religious and ecclesiastical houses and places, and all their manors, lands, tenements, tithes and other hereditaments, which, since the 4th day of February, in the 27th Henry VIII., had been dissolved, suppressed, renounced, relinquished, forfeited, given up, or by any other means come to the king; and all other monasteries, &c., and all other ecclesiastical houses and places which should afterwards happen to be dissolved, suppressed, renounced, relinquished, forfeited, given up, or by any other means come to the king; and all their manors, lands, tenements, &c., and other hereditaments, were vested in the actual seisin and possession of the king, his heirs and successors for ever. The priory or hospital of St. John of Jerusalem, in England, and another house belonging to the same order, at Kilmainham, in Ireland, were dissolved by the statute 32 Henry VIII. c. 24, which was passed expressly for that purpose.

The statute 37 Henry VIII. c. 4, charged misdemeanors on the priests and governors of chantries,—that of their own authority, without the assent of their patrons, donors, or founders, they had let leases for lives, or terms of years, of their said lands; and some had suffered recoveries, levied fines, and made feoffments and other conveyances, contrary to the will and purposes of their founders, to the great contempt of the royal authority; wherefore, in consideration of his majesty's great costs and charges in his then wars with France and Scotland, the Parliament put him, and his successors for ever, in the real and actual possession of such chantries.

Chantries consisted of salaries allowed to one or more priests, to say daily mass for the souls of their deceased founders and their friends; these not being able to stand of themselves, were united, for their better support, to some parochial, collegiate, or cathedral church. *Free chapels*, though for the

same use and service, were of a more substantial and firm constitution, as independent of themselves. *Colleges* were of the same nature with the former, but more considerable in extent of building, number of priests, and endowments (*c*).

The remaining establishments of this kind were destroyed by statute 1 Edward VI. c. 14 (*d*), which gave to the king all chantries, colleges, and free chapels; all lands given for the finding of a priest for ever, or for the maintenance of any anniversary, *obit* light or lamp in any church or chapel, or the like; all fraternities, brotherhoods, and guilds, (except those for mysteries and crafts,) with all their lands and possessions. There are several exceptions in this act, which have saved some of the least objectionable of these institutions, (stripped however of their superstitions,) and such as were only included in the expressions of the act, but not in its design—as the universities and colleges for piety and learning (*e*).

The statute 9 Geo. II. c. 36, commonly, though improperly, called the Statute of Mortmain, will be hereafter considered (*f*). The object of that act is not to prevent alienations in mortmain; but in the first place to require the conveyances of lands to *charitable uses*, to be made by deed inrolled within twelve months before the grantor's death, and to prevent devises of real property, or any interest therein, or bequest of money to be laid out in any such interest, for any charitable purposes whatsoever. The only case in which it can properly be said to relate to mortmain, is as to conveyances to bodies politic or corporate for charitable uses (*g*).

SECTION II.

Of the different kinds of Corporations.

The statutes of mortmain being framed principally with the view of preventing the acquisition of lands by corporate

(*c*) Fuller's Hist. of the Church, book vi. 350; Tann. Not. by Nasmith, Pref. 18, n. (*w*).

(*d*) See *post*. chap. ii. s. 3.

(*e*) 4 Reeves's Hist. 439.

(*f*) See *post*. chap. iii.

(*g*) See 4 Ves. 427, 428.

bodies without license in mortmain, it may be proper in this place to take a general view of the different kinds of corporations.

A corporation, or a body politic, or body incorporate, has been defined (*h*) a collection of many individuals, united into one body, under a *special denomination*, having perpetual succession under an *artificial form*, and vested by the policy of the law with the capacity of acting, in several respects, as an individual; particularly of taking and granting property, of contracting obligations, and of suing and being sued; of enjoying privileges and immunities in *common*, and of exercising a variety of political rights, more or less extensive, according to the design of its institution, or the powers conferred upon it, either at the time of its creation, or at any subsequent period of its existence.

The first division of corporations is into *aggregate* and *sole*. Corporations aggregate, consist of many persons united together into one society, and are kept up by a perpetual succession of members, so as to continue for ever; of which kind are the mayor and commonalty of a city, the head and fellows of a college, the dean and chapter of a cathedral church (*i*).

A sole corporation consists of one person only, as the king (*k*), a bishop, a parson, or a vicar. A prebendary or parson holding his possessions singly is a corporation sole; but if with others, he makes a chapter, and thereby becomes a member of a corporation aggregate, so the same person, by being incumbent of the same preferment, may be both a corporation sole, and a member of a corporation aggregate (*l*). In the case of a conveyance *to* a corporation sole, to uses by his natural as well as corporate name, the Court would in favour of the conveyance intend that it was made to him in his proper capacity, and not in his corporate character (*m*).

Another general division of corporations, whether sole or aggregate, is into *ecclesiastical* and *lay* (*n*). Ecclesiastical corporations are those, of which not only the members are spiritual persons, but of which the object of the institution is

(*h*) 1 Kyd on Corp. 13.
(*i*) 1 Bl. Comm. 470.
(*k*) 10 Rep. 29 b.; Roll. Abr. 512.
(*l*) Wats. Cl. L. 377.
(*m*) Plowd. 102, 103, 234.
(*n*) Co. Litt. 250 a.

also spiritual: such are bishops, some deans and prebendaries, all archdeacons, parsons, and vicars, and formerly chauntry priests, which are *sole* corporations; deans and chapters at present, and formerly priors and monks, which are corporations aggregate.

It is not the description of the persons who are the members of a corporation, but the purpose of the institution, which gives to it the character of a lay or spiritual foundation; and for this reason, though the greater part of the members of the colleges in the Universities are clerical, yet they are in general to be considered as lay foundations (*o*); they are not within the jurisdiction of the Ecclesiastical Courts, their members have no admission or institution from the ordinary, they are merely private societies, to be governed by their own statutes and orders (*p*). Most of them were founded *ad studendum et orandum*; the object of their studies is human learning in its various branches, as logic, philosophy, mathematics (*q*). The colleges and halls in the Universities have been incorporated by various names, as "wardens and fellows," &c., "provost and fellows," or "provost, fellows and scholars," or "president and fellows," or "president and scholars," or "master and fellows," or "principal and fellows," or "warden, fellows and scholars," or "warden and scholars," or "master, fellows and scholars."

Lay corporations are again subdivided into two classes, *eleemosynary* and *civil*. Eleemosynary corporations are such as are constituted for the perpetual distribution of the free alms, or bounty of the founder of them, to such persons as he has directed (*r*). These are of two general descriptions: hospitals for the maintenance and relief of poor and impotent persons; and colleges for the promotion of learning, and the support of persons engaged in literary pursuits; of which the greater number are within the Universities, being corporations within a corporation, of which they form a component part;

(*o*) Carth. 93; 1 Lord Raym. 6.
(*p*) Skinn. 494.
(*q*) See Camden's Britt. 258—262, 401; Sir T. Raym. 107, 108; Stow's Chron. by Howes, 1057, &c.; 1 Kyd on Corp. 23.
(*r*) 1 Bl. Comm. 471.

and other colleges are out of the Universities, and not necessarily connected with them. Of hospitals, says Lord Coke, "some are corporations aggregate of many, as of master or warden, and his *confreres;* some where the master or warden hath alone the estate of inheritance in him, and the brethren or sisters have power to consent, having a college or common seal." (*s*).

Between such colleges as these, and colleges either in the Universities or out of them, there is no difference in legal consideration; the difference is only in degree; for where in an hospital the master and poor are incorporated, it is a college having a common seal, by which it acts, although it have not the name of a college (*t*). But there are other hospitals, where the master or warden hath the estate in him, but where there is no college or common seal; and which therefore cannot properly be considered as corporations, the master or warden being merely a trustee for the house.

There are other hospitals, where the poor, who are the objects of the founder's bounty, are not themselves incorporated, but the corporate succession is vested in trustees, under various denominations, who, of course, have no beneficial interest, but are only employed as instruments to effectuate the purposes of the institution; of this description is Sutton's Hospital, commonly called the *Charter House* (*u*), and most other hospitals of modern creation; but these, says Lord Coke, are not legal hospitals (*v*).

There are also many other corporations resembling hospitals of this last description, which are neither colleges nor hospitals, but which may be classed under the head of eleemosynary corporations, as their object is, by means of trustees incorporated, to carry into execution some public charity; such is the corporation created in the reign of Queen Anne (*w*), under the name of "the Governors of the Bounty of Queen Anne, for the augmentation of the maintenance of the poor

(*s*) Co. Litt. 342 a.
(*t*) Skinn. 484.
(*u*) 10 Rep. 1, 35.
(*v*) 10 Rep. 31 a.
(*w*) 2 & 3 Anne c. 11; 5 Anne c. 24; 6 Anne c. 27; 1 Geo. I. stat. 2, c. 10; 3 Geo. I. c. 10.

clergy:" and such are many corporations of trustees for the education of children at free schools, and many others, for various purposes.

Civil corporations are established for a variety of temporal purposes. Thus a corporate capacity is given to the king, to prevent in general the possibility of an *interregnum*, or vacancy of the throne, and to preserve entire the possession of the crown, for immediately on the demise of one king, his successor is in full possession of the regal rights and dignity (*x*). Other civil corporations are established for the purpose of local government; such as corporations of cities and towns, under the names of mayor and commonalty, bailiff and burgesses, and other similar denominations; and to this class belong the general corporate bodies of the two Universities, which are not corporations of colleges, but of matriculated members; and all colleges are distinct and separate corporations, yet furnishing members to be matriculated (*y*). The two Universities are now considered as lay corporations, with temporal rights, not as eleemosynary foundations, as particular colleges are; and the crown can neither visit them nor take from them any rights subsisting under old charters or prescriptive usage (*z*), nor give them new statutes, without their own voluntary acceptance (*a*).

Other corporations are established for the maintenance and regulation of some particular object of public policy, such as the corporation of the Trinity House, for regulating navigation, the Bank, and the different insurance companies in London; others for the regulation of trade and commerce, such as the East India Company (*b*), and the companies of trades in London and other towns; others for the advancement of science in general, or some particular branches of it: such are the College of Physicians (*c*), and the Company of Surgeons, the Royal Medical and Chirurgical Society (*d*)

(*x*) 1 Bl. Comm. 470.

(*y*) Wilmot's Notes, 14.

(*z*) *Rex* v. *Vice Chancellor of Cambridge*, 3 Burr. 1652, 1656.

(*a*) *S. C.* 1 Bl. Rep. 550.

(*b*) See 1 Chitty's Comm. Law, 661—689.

(*c*) Incorporated by 14 Hen. VIII. c. 5; confirmed by 1 Mar. sess. 2, c. 9.

(*d*) Incorporated by Charter, dated, 30 Sept. 1834.

in London for the improvement of medical science; the Royal Society for the advancement of natural knowledge (*e*); the Society of Antiquarians for promoting the study of antiquities; the Royal Academy of Arts for cultivating painting and sculpture; the Royal Institution of Great Britain, first established by charter (*f*), for diffusing the knowledge and facilitating the general introduction of useful mechanical inventions and improvements; and for teaching the application of science to the common purposes of life, and extended by act of Parliament to the promotion of chemical science by experiments and lectures; for improving arts and manufactures; to discovering the uses of the mineral and other natural productions of this country; and to the diffusion and extension of useful knowledge in general (*g*).

The subscribers or proprietors of shares in canals, railroads, and other public undertakings, have been incorporated by several private acts of Parliament, with power to purchase and hold lands for the purposes of the undertakings, without incurring the penalties of the statutes of mortmain, as "the proprietors of the Macclesfield canal" (*h*); "the Glastonbury navigation and canal company" (*i*); "the Nottingham Trent waterworks company" (*j*); to which many others might be added.

A corporation may exist by four means; either by common law, as a bishop or parson, by act of Parliament, by prescription, or by charter (*k*). The king alone by his prerogative, can erect either an ecclesiastical (*l*) or lay (*m*) corporation; although the king may give power to a common person to name the corporation, and the persons it is to consist of (*n*); and by statute 39 Elizabeth, c. 5. (*o*), every person seised of an estate in fee simple, may, by deed inrolled, erect an hos-

(*e*) Incorporated by charter, 22 April, 1663. See a full statement of the charter and statutes in Postlethwaite's Dict. tit. *Royal Society*.
(*f*) 13 January, 1800.
(*g*) 50 Geo. III. c. 51.
(*h*) 7 Geo. IV. c. 3.
(*i*) 7 & 8 Geo. IV. c. 41.
(*j*) 7 Geo. IV. c. 111.
(*k*) 10 Rep. 29 b.; Co. Litt. 250 a.; *Conservators of River Tone* v. *Ash*. 10 Barn. & Cr. 383, 384.
(*l*) 5 Rep. 26 a.; 4 Rep. 107 b.
(*m*) 10 Rep. 33 b.; Jenk. Cent. 270.
(*n*) 10 Rep. 33 b.
(*o*) See *post*. sect. 4.

pital or house of correction, which shall be incorporated and have perpetual succession, and be visited by such person as shall be named by the founder. If the king, after the foundation of a college, grants an advowson or land to the senior fellow, such grant will operate to make him a sole corporation (*p*). To create a corporation by charter or act of Parliament, it is not necessary to use any particular form of words. It is sufficient if the intent to incorporate be evident (*q*), and where it manifestly appeared from the different clauses of several local acts of Parliament (*r*), that conservators of a river navigation should take land by succession, and not by inheritance; although they were not created a corporation by express words, they were held to be so by implication, and entitled to sue in their corporate name for an injury done to their real property (*s*).

By the common law, it was an incident to every corporation to have a capacity to purchase lands for themselves and their successors (*t*).

It may be observed, that none of the statutes of mortmain limit the *extent* to which a corporation may purchase lands; but that the object of all of them is to prevent a corporation from making any purchase without obtaining a previous license: with the king's consent, therefore, corporations may generally purchase lands to any extent they please, although in modern charters and acts of Parliament creating corporations, a clause is now usually inserted for restraining them from purchasing lands beyond a certain annual value.

The case already stated *u*), may operate as a caution to parties advancing money to corporate bodies by way of mortgage, and show the necessity of previously ascertaining that such

(*p*) 1 Ves. sen. 473.

(*q*) 10 Rep. 28.

(*r*) *Tone Navigation*, 10 & 11 Wm. III., 6 Anne, 44 Geo. III., 51 Geo. III., 5 Geo. IV.

(*s*) *The Conservators of the river Tone* v. *Ash*, 10 Barn. & Cr. 349.

(*t*) Litt. Rep. 49, 112, 114; 10 Rep. 30 b.; 1 Bl. Comm. 478. By the civil law, a corporation was incapable of taking lands, unless by special privilege from the emperor; *Collegium, si nullo speciali privilegio subnixum sit, hæreditatem capere non posse, dubium non est.* Cod. lib. 6. tit. 24. 8. 1 Browne's Civ. L. 141—164.

(*u*) *Ante*, p. 10, n. (*e*).

corporation has power to take lands in mortmain, and that they have not already acquired property to the extent of their license.

On a conveyance by deed to a corporation aggregate, they will take a fee simple without the word successors, because in judgment of law they never die. But a gift to a corporation sole, as to a bishop or parson, without the word *successors*, in general passes only an estate for life; though a gift to the king without that word passes a fee, because the king never dies, so a gift in "frankalmoign" of itself, implied a fee (*v*). It is a general rule, that when a corporation aggregate has by its constitution a head, a grant to that corporation during the vacancy of the headship is void; thus an immediate grant to a corporation consisting of mayor and commonalty, while there is no mayor, or to a dean and chapter, when there is no dean, is void, because without the head, the corporation is incomplete, and the only act it can do during the vacancy is to elect another, although a grant in remainder will be good, if a head be elected during the particular estate (*w*).

Some corporations have a corporate capacity for some particular purpose only: thus the parson of a church is a corporation for taking land, but *not goods*, for the benefit of the church; and on the other hand, churchwardens are a corporation for taking goods, but *not land*, for the use of the church (*x*). So churchwardens may take goods in succession for the use of the parishioners (*y*); so a gift of chattels to the parishioners is good, and the churchwardens may maintain an action for them, the gift being considered as for the use of the church (*z*); but they have not capacity to take a bond to them and their successors, for in such case the right of action will survive to their personal representatives (*a*). Church-

(*v*) Co. Litt. 9 b., 94 b.

(*w*) Bro. Corp. 58, 59. See Co. Litt. 264 a.; 10 Rep. 31 b.; Hob. 33; Case of *Corpus Christi*, Coll. Dalison, 31; *S. C.* 4 Leon. 223; See Cowp. 224—226.

(*x*) *Attorney General* v. *Ruper*, 2 P. Wms. 125. Vin. Abr. Churchwardens (A).

(*y*) 2 Bro. Corp. 60; 1 Kyd. on Corp. 29.

(*z*) Bro. Corp. 73.

(*a*) Vin. Abr. Churchwardens (D). pl. 5.

wardens are not a corporation for taking lands by gift or grant for the use of the church or other purposes, unless they have been incorporated by letters patent (*b*). Therefore a feoffment to the use of the churchwardens, or a gift or devise to the parishioners, is bad; nor can churchwardens prescribe to have lands to them and their successors (*c*). Neither can they make a lease of lands given to feoffees for the use of the parishioners (*d*); and a tenant of lands belonging to a parish, who had paid rent to the churchwardens, was held not to be estopped from questioning the title of another party, who claimed the same lands under a lease granted by them (*e*). The churchwardens cannot maintain trespass, nor other action, for entry or taking the profits of such lands (*f*).

Though the corporate capacity of churchwardens is in general thus limited, yet in particular cases, either by custom, charter, or statute, they may enjoy a more enlarged capacity. Thus, by the custom of London, the parson and churchwardens constitute a corporation to purchase and demise lands (*g*). In the case of St. Saviour's, Southwark, it was granted by letters patent of Elizabeth, that the parishioners, or the greater number of them, should annually elect two churchwardens; and that the said churchwardens, and their successors, should be a corporation, with a capacity to make purchases and sell lands. So by charter it was granted, that the parishioners of Wallingford should be a corporation, to buy and sell; in consequence of which, they, or the majority, were accustomed to make leases and estates (*h*).

By statute 9 Geo. I. c. 7, s. 4, the churchwardens and overseers (which has been construed to mean the major part of them) (*i*) of the poor in any parish, town, township, or place, with the consent of the major part of the parish-

(*b*) 1 Roll. 393, l. 10; Keilw. 32 a.; Finch's L. 179; Co. Litt. 3 a.; Com. Dig. Esglise (F) 3; Ambl. 644.

(*c*) Vin. Abr. Churchwardens (A)

(*d*) *Phillips* v. *Pearce*, 5 Barn. & Cr. 433; *S. C.* 8 Dowl. & Ryl. 43.

(*e*) Id.

(*f*) Com. Dig. Esglise (F) 3.

(*g*) *Evelin's Case*, Cro. Car. 552; W. Jones, 439; March, 67 pl. 104; Com. Dig. Esglise (F) 3.

(*h*) *Case of St. Saviour's, Southwark*, Lane, 21; See 10 Rep. 66.

(*i*) *Rex* v. *Beeston*, 3 Term Rep. 592.

ioners or inhabitants in vestry or other public meeting assembled for the purpose, upon usual notice given, are empowered to purchase or hire any house or houses in the same parish, &c., to lodge and employ the poor in. And by 59 Geo. III. c. 12, s. 8, in any parish not having a workhouse, or where the workhouse shall be insufficient or inconvenient, the churchwardens and overseers of the poor, by the direction of the inhabitants in vestry assembled, may erect and build in such parish a suitable workhouse, or alter and enlarge any messuage or tenement belonging to such parish for that purpose; and purchase and take on lease any ground within the parish for the purpose of such building, or for enlarging any other messuage or tenement belonging to the parish for that purpose; the churchwardens and overseers being thereby authorized to add to and enlarge any insufficient workhouse, as the inhabitants of the parish in vestry assembled shall think fit.

Many inconveniences were experienced with respect to lands belonging to parishioners, in consequence of churchwardens not being a corporation. By statute 59 Geo. III. c. 12, s. 12, (which extends to England only,) the churchwardens and overseers of the poor of any parish are empowered, with the consent of the inhabitants in vestry assembled, to take into their hands any land belonging to the parish, or to purchase, or to hire, and take on lease, for and on account of the parish, any suitable portion or portions of land within or near the parish, not exceeding 20 acres in the whole, and to employ the poor of the parish in the cultivation of such land. The 17th section of the same act enacts, that all buildings, lands, and hereditaments, which shall be purchased, hired, or taken on lease, by the churchwardens and overseers of the poor of any parish, by the authority and for the purposes of that act, shall be conveyed, demised, and assured to the churchwardens and overseers of every such parish respectively, and their successors, in trust for the parish; and such churchwardens and overseers of the poor, and their successors, shall and may, and they are thereby empowered to accept, take, and hold, in the nature of a body

corporate, for and on behalf of the parish, all such buildings, lands, and hereditaments, and also all other buildings, lands, and hereditaments, belonging to such parish; and to sue as a body corporate, in relation to any such buildings, lands, and hereditaments, or the rent thereof.

This act extends to tenements, the profits of which are applicable to the purposes for which a church-rate is levied, and is not confined to those which are applicable merely to the relief of the poor. Thus in an action of ejectment by the churchwardens and overseers of a parish, to recover certain premises which had been demised to the defendant, in 1786, by certain persons described as inhabitants, parishioners, and feoffees of parish and church lands belonging to a parish, it was insisted, that the statute 59 Geo. III. c. 12, s. 17, did not apply; first, because the persons in whom the legal estate was vested, were trustees only; and secondly, because the profits of the premises sought to be recovered, were applicable, not to the relief of the poor, but solely to those purposes for which the church-rates were levied. As to the first of these objections, it was held by the Court, that there is nothing in the act of Parliament to prevent property held by trustees for the benefit of a parish from vesting in the churchwardens and overseers; and it would be very inconvenient that it should be so. It is often difficult for persons who claim under an ancient trust, (where the trustees are numerous,) to ascertain who was the survivor of these trustees; and even if they succeeded in ascertaining that fact, it will not be less difficult to show who is the heir at law of that survivor. Property vested in trustees for the benefit of the parish, seems equally within the mischief contemplated by the Legislature, as well as property not so vested. The Court also held, that the latter words of the 17th section of the act, comprehended all buildings belonging to the parish; and although the poor might be the primary object of that act, yet that the safest course to adopt in construing that section, would be to give full effect to that generality of expression—there being nothing to show that lands or buildings which are applied in aid of the church-rate, do not require

the aid of that provision, as well as those which are applied to the relief of the poor. In both cases, there is the same difficulty of finding out in whom the legal estate in the premises belonging to the parish is vested, and that was the mischief which, by the 17th section, the Legislature intended to remedy; and there was no reason to doubt, that the operation of that clause was intended to be coextensive with the mischief (*i*).

In order to constitute a body corporate within this act, there must be two overseers and a churchwarden or churchwardens; and parish property does not become vested under it, in either class singly. Thus where two persons were appointed overseers of the poor of a parish on the 5th April, 1823, and on the 22nd of the same month one of the *same* persons was appointed sole churchwarden, the custom of the parish being to have only one, as it did not appear that at the time of the appointment of the overseers there was a churchwarden; it was held, that the property did not vest in those two persons, as they alone did not constitute a corporation of churchwardens and overseers (*j*). Where parishioners were in possession of land in the parish, upon which houses were built, the rent of which was applied in aid of the poor rates, and there were no documents to show how they became possessed, a lease granted by the churchwardens alone, was held bad; the case not coming within the statute 59 Geo. III. c. 12, s. 17; because the demise was by the churchwardens without the overseers (*k*).

It seems, that in an ejectment for parish lands, it would be sufficient to lay a demise by the corporate name of churchwardens and overseers of the parish, naming the parish, without describing them by their names (*l*).

In early times, landed property was capable of being transmitted to bodies of individuals in succession, which

(*i*) *Doe* d. *Jackson and others* v. *Hiley*, 10 Barn. & Cr. 885—894.

(*j*) *Woodcock* v. *Gibson*, 4 Barn. & Cr. 462; *S. C.* 6 Dowl. & Ryl. 524; See *Doe* d. *Grundy* v. *Clarke*, 14 East, 488; 3 T. R. 594.

(*k*) *Phillips* v. *Pearce*, 5 Barn. & Cr. 433; *S. C.* 8 Dowl. & Ryl. 43.

(*l*) *Doe* d. *Churchwardens and Overseers of Orleton* v. *Harpur*, 2 Dowl. & Ryl. 708; See 59 Geo. III. c. 12, s. 17.

were not incorporated (*m*); it has, however, long been an established maxim of the English law, that land granted to a community or aggregate body of men, not incorporated, cannot, by virtue of the original grant alone, be transmitted to their successors (*n*). Where land, therefore, is granted to individuals not incorporated, for charitable or other uses, intended to have perpetual duration, the only legal way of continuing the property to any other persons for the same purposes, is by endless conveyances from one to the other as often as the hands are changed.

The societies of the Inns of Court, which are not corporations but voluntary societies (*o*), in their collective capacity, have held the property of the ground on which the chambers are built, ever since they were established. The mode by which these societies supply the defect arising from their not being incorporated, is said to be this—the first grant of the possessions was made to a select number, and their heirs, in trust for the society at large; this select number forms the bench; as the members of it die, they choose others from the society: the legal property is in the surviving members only, of the original trustees; when that number is considerably reduced, the survivors convey to one or two of their officers, or to some third party, in trust to convey to all the existing members of the bench; such conveyance is accordingly made, and thus the succession is continued (*p*).

The common method of giving real and personal property to charitable uses, has been to vest it in certain trustees, upon such trusts as are mentioned in the deeds or writings by which they are appointed, with power from time to time, when the trustees are reduced to a certain number by death or other means, for the survivors, by a new appointment and conveyance of the estate to other trustees, to supply the place of the trustees who have died, or resigned the trust. On the appointment of new trustees, the surviving trustees, or the

(*m*) *Ante*, 19.

(*n*) 10 Rep. 26 b.

(*o*) See *Rex* v. *Benchers of Gray's Inn*, Dougl. 354; *Rex* v. *Benchers of Lincoln's Inn*, 4 Barn. & Cr. 855; Dugd. Or. Jur. 145, 146; Stow's Chron. by Howes, 1069—1074.

(*p*) 1 Kyd on Corp. 6, 7.

heir at law or devisee of the last surviving trustee, usually conveys the estate by lease and release to a third party, to the use of the new trustees and their heirs, upon the trusts declared in the deed or will by which the charity was originally created. Many instances are to be found of corporations erected expressly for the purpose of being trustees for charities. In other cases, existing corporations have been made trustees of charities, thus: by charter, 26th June, in the seventh year of the reign of Edward VI., the management and government of the Hospital of St. Thomas the Apostle, and of the Hospitals of Christ and Bridewell, were vested in the mayor, commonalty, and citizens of the city of London, and their successors, who were thereby named governors of the said hospitals, and constituted a body politic and corporate, by the name of "the Governors of the possessions, revenues, and goods of the hospitals of Edward, king of England, the sixth, of Christ, Bridewell, and St. Thomas the Apostle" (*q*). The members of many other corporations and companies have, in like manner, been incorporated as governors of schools and charities.

SECTION III.

Of Licenses to hold Lands in Mortmain.

1. *How such Licenses were formerly granted, and when necessary.*
2. *The present Power of the Crown to grant such Licenses,* p. 39.

1. *How such licenses were formerly granted, and when necessary.*] Alienations in mortmain were not made void by the preceding statutes (*r*), so as to let in the grantors or their heirs at law; but operated as a forfeiture, giving a right to the

(*q*) 10 Rep. 31 b. (*r*) *Ante*, pp. 5—17.

mesne lords and the king to enter upon and seize the lands; if such right, therefore, was waived, the alienation was good; hence arose the dispensation with those statutes, called a license in mortmain (*s*).

A license from the crown is said to have been necessary in England, before the Conquest, for alienations in mortmain (*t*); but however that may have been, the power of the crown to grant such licenses, notwithstanding the *statutes* of mortmain, was soon established. The words of 9 Henry III. (*u*) seem to imply a general prohibition in favour of the immediate lord of the fee; but as every man may dispense with a forfeiture intended for his own benefit (*v*), it seems that notwithstanding that statute, an alienation in mortmain was lawful, if made with the license of the immediate lord, whether that lord was the king or a subject; and the complaint in the preamble of the next statute (*w*) does not extend to the alienation without the license of any other, although it complains of the practice of religious men entering upon fees holden of themselves, against which the first statute had provided. From which it is manifest, that the general interest of the community began to be considered as equally endangered by these appropriations, as the particular interests of the lords. The enacting part of the second statute, therefore, not only prohibits all the practices complained of, but makes a provision for the entry of the king, in default of all the other lords. From this time, therefore, it may be supposed, that if an alienation in mortmain was permitted at all, it must have been in consequence of a license, not only from the *immediate* lord, but from all the *mediate* lords and from the king (*x*).

A mode was then prescribed for applying for the license, for by 27 Edward I. stat. 2 (*y*), it was enacted, that *men of*

(*s*) See Wilmot's Notes, 9, 10.

(*t*) 1 Selden, Jan. Angl. lib. ii. s. 45; Vin. Abr. tit. *Mortmain* (A); MS. Cotton Claud (B), fol. 26; Bac. Abr. tit. *Charitable Uses* (A).

(*u*) *Ante*, p. 5.

(*v*) Alienatio licèt prohibeatur, consensu tamen omnium, in quorum favorem prohibita est, potest fieri; and quilibet potest renunciare juri pro se introducto. Co. Litt. 99 a.; Kitch. on Courts, 78; Fitz. 211.

(*w*) 7 Edw. I. stat. 2; *ante*, p. 6.

(*x*) Kyd on Corp. 88, 89.

(*y*) See 2 Reeves's Hist. 230, 231.

religion that would *amortise* lands or tenements, should have a writ out of the Chancery to inquire according to the points accustomed in such things; and that inquests of lands or tenements that be worth yearly more than 20*s.* by extent, be returned into the Exchequer, and there the fine shall be made for the amortisement, if the inquests do pass for them that purchase, and after, it shall be commanded unto the chancellor, or his deputy, what he shall do therein.

It is probable, that in conseqnence of this statute, the license of the king came to be considered as of the principal importance, and that the interest of the mesne lords began to be overlooked, which gave rise to the statute 34 Edward I. stat. 3; by which it was enacted, that "where there were mesne lords, nothing should be done in pursuance of the former statute, unless the *religious* persons could show to the king the assent of such lords, under their patents, sealed with their seals, and that nothing should pass where the donor reserved nothing to himself; or where inquisitions were made without warrant, that is, without the original writ being returned with the inquest, and unless the original writ made mention of every thing required by the new ordinance devised by the king." The new ordinance here referred to, was the statute 27 Edward I. stat. 2(*z*). The power of the crown to grant such licenses, is recognized by several statutes (*a*).

(*z*) 1 Kyd. on Corp. 89.

(*a*) 18 Edward III. stat. 3, c. 3, is in these words, "If prelates, clerks, beneficed or religious people, which have purchased lands, and the same have put to mortmain, be impeached upon the same before our justices, and they show our charter of license and process thereupon made by an inquest of *ad quod damnum*, or of our grace, or by fine, they shall be freely let in peace, without being further impeached for the same purchase. And in case they cannot sufficiently show that they have entered by due process, after license to them granted in general or in special, that they shall be well received to make a convenient fine for the same, and that the inquiry of this article shall wholly cease, according to the record comprized in this Parliament." This right of the crown is recognized by several acts of general pardon, which except lands aliened into mortmain without *license royal*. See statutes 21 Richard II. c. 15, 25 Richard II. c. 5, 2 Henry IV. c. 13.

The third charter of Edward IV., dated 20 June, 18th year, to the city of London, granted in consideration

The writ *ad quod damnum* lay where a man would give lands or tenements in mortmain, as to a religious house, or to a body politic in fee simple, in which cases he ought to have had the king's license and the license of the chief lords of whom the lands were holden to make such gift. That writ was directed to the king's escheator for the county in which the lands or tenements lay which were intended to be aliened in mortmain; and commanded him, by the oath of good and lawful men, diligently to inquire whether it would, or would not, be to the damage or prejudice of the king, or of others, that the king should grant to the person who had sued out the writ, the liberty of aliening to the particular corporation, whether sole or aggregate, to which the alienation was to be made, the particular lands or tenements described in the writ; and, if it should appear to be to the damage or prejudice of the king, or of others, then to what extent, and of whom, by what tenure, and by what services, the lands or tenements were holden, what was their real annual value, and who were the mesne lords between the king and the tenant who intended to alien; what lands and tenements would remain to the tenant after the intended alienation, where they were situate, of whom, by what tenure, and by what services they were held, and what was their annual value; and if lands and tenements would remain to him, whether these would be sufficient to enable him to perform all the services which were due, as well for the lands and tenements intended to be aliened, as for what should remain to him after the alienation; and to support all the burthens which he then bore, or was accustomed to bear, as in suit of court, view of frankpledge, aids, talliages, watchings, fines, redemptions, amercements, contributions, and all other burthens whatever; and whether he could be put

of the payment of a sum of money, that the city should have liberty to purchase in mortmain lands and tenements to the value of 200 marks *per annum*, without hinderance of the king's justices, escheators, or other officers, and without the necessity of any inquisitions upon the writ *ad quod damnum*, and notwithstanding the statutes of mortmain. Norton's Comm. on London, 490.

upon assizes, juries, and other inquisitions, in the same manner as before the intended alienation. It then commanded, that the writ should be returned with the inquisition into Chancery, under the seals of the escheator and of the jurors, by whom the inquisition was taken (*c*). The forms of such writs were various, and adapted to the circumstances of the parties desirous of aliening (*d*). The course of proceeding seems to have been for the tenant who intended to convey in mortmain, to apply first for leave from the king to sue out the writ, and then, after the return of it by the escheator, if the inquisition was in favour of the alienation, to obtain letters patent of license from the king and the intermediate lords; but these could not depart from the substance of the particulars rehearsed in the writ (*e*).

These writs appear to have fallen into disuse in the time of Fitzherbert, by the practice of obtaining the king's license to alien in mortmain, with a clause at the end, dispensing with the writ of *ad quod damnum*, or any other writ and inquests, and commands, although such license was considered valid without such express dispensation (*f*). A license was necessary to enable an abbot and his successors to take a rent charge (*g*). So if an abbot held of another man by a certain rent service, the lord could not release the rent without the king's license, and if he did, it was mortmain. The king's license was considered necessary on the exchange of lands between two corporate bodies (*h*). Such a license is also now necessary for enabling corporations to take leases for long terms of years (*i*). A license was necessary in order to found and endow a prebend with lands (*k*). And if a man devised lands or rents to his executors, and to their heirs, to dispose according to his will, and he afterwards by his will directed them to give the same in mortmain, they ought to have the king's license and writ *ad quod damnum* (*l*).

(*c*) Fitz. N. B. 221 (O)—223.
(*d*) Id. 222 (C)—226.
(*e*) Id. 221 (O), 224 (C), (D).
(*f*) Co. Litt. 99 a.
(*g*) Fitz. N. B. 223 (B).
(*h*) Id. 223 (I), 223 (E), 224 (D).
(*i*) See *ante*, p. 9.
(*k*) Fitz. N. B 224 (E).
(*l*) Id. 224 (F).

An abbot could not give lands or tenements in mortmain to another abbot or prior, or body corporate, without the king's license; the words of the statute being so that the lands and tenements may not by any means come into mortmain (*m*).

2. *The present power of the Crown to grant such licenses.*] The pretended power of the crown of suspending or dispensing with laws, or the execution of laws, by regal authority, without consent of Parliament, having been declared illegal (*n*) by the statute 1 Will. & Mary, sess. 2, c. 2, it was thought prudent to confirm by act of Parliament, the king's power of granting licenses in mortmain, in order, on the one hand, to prevent such licenses from being confounded with a dispensation with the statutes of mortmain, and on the other, to remove all doubts that might have been entertained of their validity.

Accordingly, the statute 7 & 8 Will. III. c. 37 (*o*), after reciting, that it would be a great hindrance to learning, and other good and charitable works, if persons well inclined might not be permitted to found colleges or schools for the encouragement of learning, or to augment the revenues of colleges or schools already founded, by granting lands, tenements, rents, or other hereditaments, to such colleges or schools, or to grant lands, or other hereditaments, to other bodies politic or incorporate, then in being, or thereafter to be incorporated for other good and public uses—enacts, that it shall and may be lawful for the king, his heirs and successors, when, and as often, and in such cases as his majesty, his heirs and successors shall think fit, to grant to any person or persons, bodies politic or corporate, their heirs and successors, license to alien in mortmain, and also to purchase, acquire, take, and hold in mortmain, in perpetuity or otherwise, any lands, tenements, rents or hereditaments whatsoever, of whomsoever the same shall be holden. The second section declares, that lands, tene-

(*m*) Id. 222 (D); See *ante*, p. 8.

(*n*) See 2 Hawk. P. C. b. ii. ch. 37, s. 30, 31.

(*o*) This act was extended to Ireland by Ir. stat. 32 Geo. III. c. 31.

ments, rents, or hereditaments, so aliened or acquired, and licensed, shall not be subject to any forfeiture, for or by reason of such alienation or acquisition (*p*). It is observable, that this statute authorizes the king to grant mortmain licenses without any regard to the person of whom the lands were held; and declares, that they shall not be subject to *any* forfeiture. Before this act, the king's license only prevented the forfeiture to himself; and if there was any mesne lord, he might take advantage of the mortmain statutes, notwithstanding the royal license (*q*). But this statute seems to be expressed so as to extend the operation of the king's license *universally*, by preventing a forfeiture to other lords as well as to the king himself. The statute is also silent as to the writ of *ad quod damnum*, which anciently was thought an essential preliminary to the license, in order that the king might know what prejudice would arise to himself or others from granting it. Since this statute, writs of *ad quod damnum*, previous to licenses from the crown to alien in mortmain, have not been usual (*r*); but in modern acts of Parliament, enabling corporations to hold lands, there is usually a dispensation with that writ, as well as the statutes of mortmain.

A license to alien in mortmain may be given for several purchases, and does not determine by the death of the king who granted it, but may be afterwards acted on (*s*).

Charters of incorporation usually contain a clause, declaring that the intended corporation shall be a body politic and corporate, and, by the particular name given to it, "have perpetual succession; and for ever thereafter be able and capable in the law, and have power to purchase, receive, and possess any goods and chattels whatsoever, and (notwithstanding the statutes of mortmain) to purchase, hold, and enjoy, to them and their successors, any lands, tenements, and hereditaments whatsoever, not exceeding, at the time or

(*p*) An account of the licenses which had been granted in April, 1736, under this act, will be found in the Journals of the House of Commons, vol. xxii. 708—710.

(*q*) See Fitz. N. B. 221 (O).

(*r*) Co. Litt. 99 a, n. (1).

(*s*) Co. Litt. 52 b.; Fitz. N. B 223 (G); Plowd. 457.

times of purchasing such lands, tenements, and hereditaments respectively, the yearly value, at a rack rent, of [a certain sum specified] in the whole, without incurring the penalties or forfeitures of the statute of mortmain, or any of them.

A license in mortmain (*t*) almost invariably specifies the amount in value of the lands which may be held by the corporation to which it is granted. When purchases have been made to the full extent of the license, a further one must be obtained; for which purpose a petition must be presented to the king, which will be referred to the Attorney General, or Solicitor General, who will make a report; upon which the license required will be either granted or refused. The discretion exercised in making such report, will probably be guided by the present opulent state of the members of the corporation, and the use intended to be made of the augmented revenue (*u*).

(*t*) See form of such a license, in the Appendix.

(*u*) Where it appeared that the lands of the governors of a free grammar school, incorporated by charter, dated the 13th May, 1566, with power to purchase lands not exceeding 30*l.* a-year, had greatly increased in value; and that the governors had sold part of their lands, and had contracted for the purchase of other lands; and that the lands belonging to the school remaining unsold were under the yearly value of 230*l.*, and those contracted for, under the yearly value of 150*l.*: all forfeitures which had accrued to the king, on account of the governors having taken lands without license in mortmain, were remitted; and license was granted to the governors and their successors, to hold in mortmain the lands conveyed to them, and to purchase others not exceeding 400*l.* per annum. *In re Rovington School, Patent Rolls*, 1827. *License* was granted to the mayor, bailiffs and burgesses of the town of Northampton, to accept and take a grant or conveyance of certain pieces of land therein mentioned, and to hold the same to the use of them and their successors and assigns for ever, with a license to all persons whomsoever to grant, sell, convey, and dispose of the same lands in mortmain to the said mayor, &c., in exchange for the lands belonging to the corporation. *Patent Rolls*, 30th Aug. 1827. See *ante*, p. 38.

SECTION IV.

Of the Dispensation with the Statutes of Mortmain in favour of particular Corporations.

1. *Foundation of Hospitals.*
2. *Workhouses,* p. 49.
3. *Augmentation of small Livings,* p. 51.
4. *Parsonage Houses,* p. 52.
5. *Building of new Churches,* p. 53.
6. *Corporations,* p. 55.

THE statutes of mortmain have been dispensed with, either generally or to a limited extent, by various acts of Parliament, some of which will be here mentioned (*v*).

The recovery of the possessions belonging to religious bodies which had been aliened by Henry VIII., was part of the policy of his next popish successor to the crown; and therefore by the statute 1 & 2 Philip & Mary, c. 8, ss. 51, 52 (*w*), the statutes of mortmain, so far as related to *spiritual* corporations, were suspended for 20 years; and free liberty was given, during that period, to those who were seised in fee simple, in possession, reversion or remainder, in their own right, of any manors, lands, tenements, parsonages, tithes, portions, pensions, or other hereditaments, not being copyhold, to convey them by feoffment, grant, or any other assurance, or to bequeath them by last will and testament in writing, to any *spiritual* body politic or corporate, then erected or founded, or thereafter to be erected or founded, without any license in mortmain, or writ *ad quod damnum.*

1. *Foundation of hospitals.*] In consequence of the dis-

(*v*) The exemptions from the stat. 9 Geo. II. c. 36, will be considered in the next Chapter.

(*w*) See Dyer, 255 b.; 1 Roll, R. 166, 418.

solution of the monasteries and other religious houses, the poor, who had derived a very considerable part of their subsistence from them (*x*), became a burthen to the public, and the Legislature found it necessary to encourage such as should be charitably disposed to appropriate part of their wealth to charitable purposes; and by statute 35 Elizabeth, c. 7, s. 27, (reviving a former statute, 22 Henry VIII. c. 22,) it was enacted, that it should be lawful for every person, during the space of 20 years then next ensuing, to make feoffments, grants, or any other assurances, or by last will, in writing, to give and bequeath in fee simple, as well to the use of the poor, as for provisions, sustentation, or maintenance of any house of correction or abiding houses, or of any stocks or stores, all or any part of such of his lands, tenements, and hereditaments, and in such manner and form as he might have done by the statute 22 Henry VIII. c. 12.

But the charges of incorporation and of the license of mortmain, which was necessary to carry into effect the purposes of this act, having become so great as to discourage many from undertaking these pious and charitable works (*y*), it was thought necessary, by an act of Parliament, to dispense, in certain cases, with the license of incorporation and mortmain, and to enable the founder to do the whole by his own act, without the immediate assent of the king to every parti-

(*x*) Though the suppression of religious houses, even considered in a political light only, was a national benefit, it must be owned, that at the time they flourished, they were far from useless. Abbeys or monasteries were then the repositories, as well as the seminaries of learning; many valuable books and national records, as well as private history, having been preserved in their libraries—the only places in which they could have been safely lodged in those turbulent times. Every abbey had at least one person whose office it was to instruct youth; and the historians of this country are chiefly indebted to the monks, for the knowledge they have of former national events. In these houses, also, the arts of painting, architecture, and printing, were cultivated. They were hospitals for the sick and poor, and afforded entertainment to travellers at a time when there were no inns. They were likewise an asylum for aged and indigent persons of good family. Ency. Britt. tit. *Abbey*.

(*y*) 2 Inst. 722.

cular foundation; it was, therefore, by the statute 39 Elizabeth, c. 5, s. 1, enacted, "that all and every person or persons seised of an estate in fee simple, their heirs, executors, and assigns, at his or their will and pleasure, should have full power and authority, at any time during the space of 20 years then next ensuing, by deed inrolled in Chancery, to erect, found, and establish one or more hospitals, *maisons de Dieu*, abiding places, or houses of correction, at his or their will and pleasure, as well for the finding sustentation and relief of the maimed, poor, needy, or impotent people, as to set the poor to work, to have continuance for ever, and from time to time to place therein such head and members, and such number of poor, as to him, his heirs and assigns, should seem convenient; and that the same hospitals or houses so founded should be incorporated, and have perpetual succession for ever, in fact, deed and name; and of such head, members, and numbers of poor, needy, maimed, or impotent people, as should be appointed, assigned, limited, or named by the founder or founders, his or their heirs, executors, or assigns, by any such deed inrolled; and that such hospital, &c., and the persons therein placed, should be incorporated, named, and called by such name as the founder, &c., should so limit, &c.; and that the same hospital, &c., so incorporated and named, should be a body corporate and politic, and should, by that name of incorporation, have full power, authority, and lawful capacity and ability to purchase, take, hold, receive, enjoy, and have, to them and their successors, as well goods and chattels as manors, lands, tenements, and hereditaments, being freehold, of any person or persons whatsoever, so that the same should not exceed the yearly value of 200*l.*, above all charges and reprizes, to any one such hospital, without license, or writ *ad quod damnum*—the statute of mortmain, or any other statute or law to the contrary notwithstanding; and that the same hospital, &c., and the persons so incorporated, should have full power, by its true name of incorporation, to sue and be sued in all courts of the realm, as well spiritual as temporal, in all manner of suits whatever; and that the same hospital, &c., should have and enjoy for

ever such a common seal or seals, as by the said founder, &c., should be, in writing under his or their hand and seal, assigned, &c., whereby the same corporation should or might seal any instrument touching the same incorporation, and the lands, tenements, hereditaments, goods, or other things thereto belonging, or in any wise touching or concerning the same. It was also provided (*y*), that no person within age or of non-sane memory, or women covert without their husbands, should have power to make or endow any such corporation; and that no such hospital should be erected unless, on the foundation thereof, the same were endowed for ever with lands or hereditaments of the clear yearly value of 10*l.*" The last-mentioned act was made perpetual by statute 21 James I. c. 1 (*z*).

The words "all and every person and persons," extend to every body politic or corporate who have power to alien, as mayor and commonalty, bailiff and burgesses, and the like, and all other persons who are not restrained by any act of Parliament to alien. The manors, lands and hereditaments whereof the endowment is made, must be *freehold* of an estate in fee simple absolute, conditional or qualified, of not less than the yearly value of 10*l.*, nor exceeding the yearly value of 200*l.* But if the first endowment be of the yearly value of 10*l.*, it may be increased by purchase or gift to the yearly value of 200*l.* without any license in mortmain; and if the lands at the time of the endowment do not exceed the value of 200*l.*, and afterwards they become of greater value, the hospital shall have the benefit of the increase, for the yearly value mentioned in the statute means at the time of the endowment; an hospital cannot be erected under this act by any other conveyance than by deed inrolled in Chancery. Although at the common law, the incorporation may be of certain persons to be governors of the hospital, which at the time of the incorporation may be only in contemplation, and not of the persons placed therein, yet the safest way, observes Lord Coke (*a*), under this statute is, for the founder

(*y*) 39 Elizabeth, c. 5, ss. 3, 4.
(*z*) 2 Inst. 722.
(*a*) 2 Inst. 724; 1 Kyd on Corp. 57—60.

first to prepare the hospital and to place the poor therein, and to incorporate the persons therein placed; after the incorporation, the next thing to be done is, to convey the lands, tenements and hereditaments to the corporation, which may be done by bargain and sale inrolled between the founder or founders, of the one part, and the master and brethren, of the other part, in consideration of *5s.* in hand paid by the master of the hospital for himself and his brethren, and of other *5s.* by the master and brethren, which bargain and sale should be made a short time after the incorporation (*b*).

It is conceived that hospitals may in the present day be founded and endowed under this statute, provided the further requisites of the statute 9 Geo. II. c. 36, be complied with (*c*).

Greenwich Hospital, which stands upon the site of a royal palace, was incorporated by William III. (*d*), and an annual sum granted for its benefit out of the Treasury. The king was empowered to grant part of his manor at Greenwich for its use; the rents of the Derwentwater estates, forfeited for high treason, were applied to it, and the governors were empowered to purchase lands for completing the hospital (*e*).

By an act to provide for the better management of the affairs of *Greenwich Hospital,* 10 Geo. IV. c. 25, s. 37, it is enacted, "that it shall be lawful for any person or persons whomsoever, having power so to do, to give, devise, or bequeath any messuages, lands, tenements or hereditaments, goods, monies, chattels and effects, to or for the use or benefit of *Greenwich Hospital;* and that the commissioners of that Hospital and

(*b*) 2 Inst. 725. Lord Coke has inserted a precedent of a deed of incorporation in 2 Inst. 723, 724, and refers to the case of *Sutton's Hospital,* 10 Rep. 17—34, for the form of the bargain and sale.

(*c*) See *post.* chap. iii. s. 1. The stat. 13 Geo. III. c. 82, contains directions for the better regulation of lying-in hospitals.

(*d*) 10 Sept. 1695.

(*e*) See 7 & 8 Will. III. c. 21; 8 & 9 Will. III. c. 23; 12 & 13 Will. III. c. 13; 4 Anne, c. 12, s. 14; 6 Anne, c. 13; 10 Anne, c. 17; 8 Geo. II. c. 29; 11 Geo. II. c. 30; 22 Geo. II. c. 52; 25 Geo. II. c. 42; 4 & 5 Will. IV. c. 34; See Tyrw. & Tyndale's Dig. of Statutes, tit. *Greenwich Hospital,* for other statutes relating to it.

their successors shall be able and capable in law, without license in mortmain, to take, hold, receive, possess and enjoy to them and their successors, for the purposes of the said hospital, or the persons supported therein or therefrom, any manors, messuages, lands, rents, tenements, annuities and hereditaments, of what nature or kind soever, or any estate or interest arising or derived out of any manors, messuages, lands, tenements or hereditaments, to them and their successors in fee and perpetuity, or for life or lives, or term of years or otherwise; and to let, sell, alien, exchange, assign or dispose of the said manors, messuages, lands, tenements or hereditaments, at their will and pleasure, as shall be most beneficial for the said institution."

By statute 13 Geo. II. c. 29, the governors of the *Foundling Hospital*, who had been incorporated by charter, were enabled to hold lands to the value of 4000*l.* a-year.

By statute 51 Geo. III. c. 105, it is enacted, that it shall be lawful for any person or persons to give, devise or bequeath, any messuages, lands, tenements or hereditaments, to and for the use and benefit of the *Royal Naval Asylum*; and that the commissioners (for the government thereof) and their successors, shall be able and capable in law, without license in mortmain, to take, hold, receive, possess and enjoy, to them and their successors, for the purposes of the said asylum, any manors, lands, messuages, rents, tenements, annuities and hereditaments, of what nature or kind soever, or any estate or interest out of the same, to them and their successors in fee and perpetuity, or for life or lives, or terms of years; and to let, sell, alien, assign and dispose of the same manors, &c., at their will and pleasure, and in such manner as shall be most beneficial for the said institution.

By 3 & 4 Will. IV. c. 9, s. 1, the members of a society called the *Seaman's Hospital Society*, are incorporated by that name, and enabled, notwithstanding the statutes of mortmain, to purchase and hold lands not exceeding the yearly value of 12,000*l.* for better carrying on that charity; and to sell, grant, demise, exchange and dispose of the same lands. The second section enables any persons or bodies

corporate, their heirs and successors, to give, grant, alien, assign, devise, bequeath, or dispose of in mortmain and perpetuity or otherwise, for the use, or in trust for the said society and their successors, any lands, rents, annuities or hereditaments, not exceeding the yearly value of 12,000*l.*, and any sum or sums of money to any amount, and any ships goods or chattels, of whatever value, for the charitable purposes of the said society; all which gifts, grants, conveyances, assignments, bequests and dispositions, the said society are authorized to receive, accept, and hold, &c.

By stat. 4 Will. IV. c. 38, the vice-presidents and treasurers and governors for the time being of *St. George's Hospital*, at Hyde Park Corner, are incorporated by the name of "The President, Vice-Presidents, Treasurers, and Governors of *St. George's Hospital*," and by the same name are enabled, without incurring the forfeitures of the statutes of mortmain, to hold and retain certain property therein mentioned, and by will, gift, purchase or otherwise, to obtain, acquire, hold and retain, for the purpose of the said institution, any lands and hereditaments of whatsoever kind the same may be, either in fee, or for terms of life or years, so as such lands and hereditaments, exclusive of the hospital and certain pieces of land therein mentioned, and exclusive of any lands and hereditaments that may at any time after the passing of the act be vested in them, or in any trustees for them, by way of mortgage, or upon which any sums of money belonging to the said institution may be charged, do not exceed the clear yearly value of 20,000*l.* over and above all charges and reprizes, computing the same at the rack rent, which might have been gotten for the same at the time of the obtaining or acquisition thereof. And also by will, gift, purchase or otherwise, to obtain, acquire, hold, and retain for the purpose of the said institution, any monies and other personal estate and property, of what nature or kind soever, including monies secured on mortgage of or charged upon any lands or hereditaments; and also to grant, alien, demise, assign, and dispose of any lands, hereditaments, monies, and other personal estate and property, for the time

being belonging to the said institution; and to do and execute all such acts, deeds, matters, and things as may be necessary for the effecting and completion of any such grant, alienation, demise, assignment, or disposition (*f*).

By statute 9 Geo. IV. c. 40, s. 25, the visitors appointed under that act for the erection and regulation of *County Lunatic Asylums* for the purposes of that act, have full power, capacity, and ability to accept and take from any person willing to give the same or otherwise, to purchase, take, hold and enjoy any lands, tenements and hereditaments, and any interest therein, and any money issuing out of, or charged upon, or to arise from the sale of lands, tenements and hereditaments, of and to any value or amount whatever; the statutes of mortmain, or any other statute or law to the contrary thereof in anywise notwithstanding.

2. *Workhouses.*] By statute 13 & 14 Charles II. c. 12, s. 5, the corporations of workhouses established by that act, for the poor of the cities of London and Westminster, and of the counties of Middlesex and Surrey, are enabled, without license in mortmain, to purchase or receive any lands, tenements or hereditaments, not exceeding the yearly value of 3000*l. per annum*, of the gift, alienation, or devise of any person or persons, who are thereby enabled without further license to give the same, and any goods, chattels, or sums of money whatever, to the uses therein mentioned.

By statute 22 Geo. III. c. 83, s. 21, it is enacted, "that the visitor and guardian for the time being of every parish, township and place, or of the several parishes, townships and places which shall be united under the provisions of that act, from and after they shall respectively have adopted the provisions of that act, shall be and are thereby respectively declared to be one body politic and corporate, and be called by the name of 'visitor and guardian,' or visitors and guardians of the poor, for the parish, township or place of ——

(*f*) As to the power to invest monies of the hospital on mortgage, see 4th & 5th sections of the act.

in the county, &c. of ——, or of the united parishes, townships or places of —— and ——, in the county, &c. of —— as the case shall be; and are thereby authorized and enabled by that name to sue and be sued, and to accept, take and hold by purchase or lease, any lands, tenements or hereditaments of inheritance, or for lives or years, or for years determinable on the death of any life or lives, not exceeding in any city or town one acre, and not exceeding in the open country 20 acres of statute measure, for the site of a house or houses to be built, and for lands to be occupied for the purposes of that act; and the said corporation is also thereby authorized and enabled to accept, take, and hold all voluntary grants and donations of lands, tenements or hereditaments of inheritance, or for lives or years, or for years determinable on lives, or of personal property which shall be made to them for the use and benefit of the poor within such respective parishes, townships or places."

Where several parishes, incorporated under this act, have a common workhouse, the appointment of a governor by one of such parishes only is void (*f*).

By statute 4 & 5 Will. IV. c. 76, s. 21, the powers given by the statutes 22 Geo. III. c. 83, and 59 Geo. III. c. 12 (*g*), and all the powers given by every other act of Parliament, general as well as local, for or relating to the building, altering or enlarging of poor-houses and workhouses, and to the acquiring, purchasing, hiring, holding, selling, exchanging and disposing thereof, or of land whereon the same may have been or may thereafter be erected, are to be exercised, subject to the rules and orders of the Poor Law Commissioners; but they or the Assistant Commissioners have no power to order workhouses to be built or hired, except under the terms contained in the act 4 & 5 Will. IV. c. 76. By the 23rd section of the last-mentioned act, the Poor Law Commissioners, with the consent of the majority of rate-payers, are empowered to order the overseers or guardians of any parish not having

(*f*) *Rex* v. *Hambledon*, 6 Dowl. & Ryl. 554.

(*g*) See *ante*, p. 30, and 4 & 5 Will. IV. c. 76, edited by Theobald, 75—95.

a workhouse, to build one; and to purchase or hire land for the purpose of building workhouses.

3. *Augmentation of small livings.*] By 17 Charles II. c. 3, s. 7 (*k*), every owner of any impropriation, tithes, or portion of tithes in any parish or chapelry in England or Wales, may give and annex the same, or every part thereof, unto the parsonage or vicarage of the said parish church or chapel, where the same do lie or arise, or settle the same in trust for the benefit of the said parsonage or vicarage, or of the curate or curates there successively, where the parsonage is impropriate and no vicar endowed according to his or their respective estates, without any license of mortmain; and by the eighth section of the same act, if the settled maintenance of any parsonage, vicarages, churches and chapels, united under that act, or of any other parsonage or vicarage with cure in England or Wales, shall not amount to the full sum of 100*l.* a year, clear and above all charges and reprizes, the parson, vicar and incumbent of the same, and his succesors, may take and purchase to him and his successors, lands, tenements, rents, tithes or other hereditaments, without any license of mortmain.

By statute 2 & 3 Anne, c. 11, s. 4, all persons having in their own right any estate or interest in any lands or hereditaments or chattels, are enabled, by deed inrolled according to the statute 27 Henry VIII. c. 16, or by will duly executed according to law, to give and grant to and vest in the governors of Queen Anne's Bounty, lands, goods and chattels for the purposes of that corporation, which has full capacity and ability to purchase, receive, take, hold and enjoy, for the purposes of that charity, as well from persons as shall give, as from all persons willing to sell or alien to that corporation, any manors, lands, tenements, goods and chattels, without any license or writ *ad quod damnum* notwithstanding

(*k*) The object of this act is extended by 29 Charles II. c. 8, and 1 & 2 Will. IV. c. 45. See Appendix. The Ir. stat. 10 & 11 Charles I. c. 2, authorizes the restitution of impropriations, either by deed or will, without license in mortmain.

the statute of mortmain; and by the 43 Geo. III. c. 107, s. 1, it is declared, that the above provision shall remain in force, notwithstanding the 9 Geo. II. c. 36.

By 1 Geo. I. c. 10, s. 4, the churches, curacies and chapels augmented by the governors of Queen Anne's Bounty, are made, from the time of such augmentations, perpetual cures and benefices; and the ministers duly nominated and licensed thereunto, and their successors, are declared to be bodies politic, to have perpetual succession, and a legal capacity to take in perpetuity to them and their successors, all such lands, tenements, tithes and hereditaments, as shall be granted unto or purchased for them by the said governors.

4. *Parsonage houses.*] By 17 Geo. III. c. 53, s. 10, where new buildings are necessary for the residence of the rector, vicar or other incumbent, the ordinary, patron and incumbent of a living may purchase a convenient habitation and land, not exceeding a certain number of acres, according to the value of the living, to be held therewith. By the 43 Geo. III. c. 107, s. 3, the governors of Queen Anne's Bounty may purchase a suitable residence for the minister of a living augmented by them. By 55 Geo. III. c. 147, s. 12, a general power is given to all owners of land, to convey to the parson, vicar or other incumbent of any ecclesiastical benefice, any messuage and land in exchange for any parsonage house and glebe lands, and to *sell* and convey to any such parson, vicar or other incumbent, any lands not exceeding twenty acres, with the necessary buildings.

By 7 Geo. IV. c. 66, s. 1, all messuages, buildings, and lands, to be purchased for the use of benefices under that act, or the statutes 17 Geo. III. c. 53, s. 10, 43 Geo. III. c. 107, s. 3, and 55 Geo. III. c. 147, s. 12, are directed to be conveyed unto and to the use of the parson, vicar or other incumbent of the benefice, curacy, or chapelry, for the residence and occupation of the parson, vicar or other incumbent whereof the same shall be purchased, and shall for ever after the conveyance thereof become annexed to the same benefice, curacy or chapelry, and be holden and enjoyed by the parson,

vicar or incumbent thereof, and his successors accordingly, without any license or writ *ad quod damnum*, notwithstanding the statute of mortmain or any other statute or law to the contrary (*h*).

5. *Building of new churches.*] By 43 Geo. III. c. 108 (*i*), every person not being an infant, insane, or feme covert, having in his own right any estate or interest in possession, reversion, or contingency, in lands or tenements, may, by deed inrolled in England according to statute 27 Henry VIII. c. 16, and in Ireland according to 10 Charles I. stat. 2, c. 1, s. 17, or by will duly executed three months before the death of the grantor or testator, give or vest in any person, or body politic or corporate, their heirs and successors respectively, any lands not exceeding five acres, or goods and chattels not exceeding 500*l.* towards erecting, rebuilding, repairing, purchasing or providing any church or chapel where the liturgy and rites of the united church of England and Ireland are observed, or any house for the residence of the officiating minister, or any outbuildings, offices, churchyard or glebe for the same respectively, and to be for those purposes applied according to the terms of the deed or will, the consent of the ordinary being first obtained; and if no such direction is made in the deed, the gift shall be applied as shall be appointed by the patron and ordinary with the consent of the incumbent; and the grantees are enabled to take, as well from persons charitably disposed to give the same, as from others willing to sell to them, any lands, tenements or chattels, without license or writ of *ad quod damnum*, notwithstanding the statute of mortmain. The second section provides, that only one such gift or devise shall be made by one person; and where either exceeds five acres or 500*l.* value in goods and chattels, the Lord Chancellor, on petition, may order its reduction to that amount, but no glebe of more

(*h*) As to endowing churches with glebe in Ireland, see Ir. Stat. 15 Charles I. c. 11, 8 Geo. I. c. 12, 1 Geo. II. c. 15, 3 Geo. II. c. 11, 4 Geo. IV. c. 86, 7 Geo. IV. c. 66.

(*i*) Amended by 51 Geo. III. c. 115, 52 Geo. III. c. 161, s. 27, and see 53 Geo. III. c. 45, s. 33.

than 50 acres can be augmented by more than one acre, and any excess therein shall be reduced by the Lord Chancellor.

By 51 Geo. III. c. 115, the king is enabled to grant to any persons or corporate bodies, their heirs and successors, for the same purposes as are mentioned in the 43 Geo. III. c. 108, any lands within the survey of the Court of Exchequer, or of the Duchy of Lancaster, not exceeding five acres in any one grant. By the second section of the 51 Geo. III. c. 115, any person having the fee simple of a manor, may grant five acres of the waste to the rector, vicar or other minister of any church or chapel, in which the service of the church of England shall be performed, or to be erected for that purpose, with the license of the ordinary of the diocese.

By statute 58 Geo. III. c. 45, s. 33, the commissioners appointed for carrying into execution the act for building additional churches in populous parishes, are empowered to accept and take any building and land not exceeding what may be sufficient for a church or chapel, or churchyard and convenient approach thereto, from any person willing to give the same; and every such site, when conveyed to the said commissioners, and the church erected thereupon, is to become for ever thereafter devoted to ecclesiastical purposes only, in order that the same may be consecrated by the bishop to public worship according to the rites of the established church; and the commissioners may accept and take from any person willing to give the same, any house, garden and appurtenances, not exceeding 10 acres in the whole, for the residence of the spiritual person serving such church or chapel, or any land not exceeding the said 10 acres in quantity, for erecting such house and appurtenances, and making such garden, and the same shall (immediately upon or after the consecration of such church or chapel) become and be the house and glebe belonging to such church or chapel, and vest in the incumbent for the time being.

By the 34th section of 58 Geo. III. c. 45, the commissioners of woods and forests, with the consent of the Treasury, Duchy of Cornwall, and any body politic, corporate or collegiate, or corporation aggregate or sole, may grant any such building

or buildings, or any site or sites for the building any such churches or chapels, with or without cemeteries thereto, and any house or appurtenances and garden, for the residence of the spiritual person who may serve the church or chapel.

By statute 5 Geo. IV. c. 103, s. 14, it is declared, that after the completion of every church or chapel, the land and site whereon the same is built shall be vested in the person or persons, and their successors for ever, by such name and style as shall be specified in the sentence of consecration; and such persons are to have perpetual succession, and to hold such lands and sites as bodies corporate, without incurring any of the forfeitures of mortmain (*i*).

6. *Corporations.*] The Corporation of the *Bedford Level*, which was established by statute 15 Charles II. c. 17, has power, by the second section of that act, without license of mortmain, to purchase manors, lands, tenements and hereditaments, not exceeding 200*l. per annum*, and goods and chattels, and to dispose thereof in the name and for the use of the corporation. This limited power of purchasing has, it is said, been exceeded by almost all corporations. From peculiar and local circumstances, the Bedford Level Corporation is now possessed of considerable freehold property, consisting almost entirely of public houses (*k*).

By statute 22 Charles II. c. 6, any bodies politic or corporate are enabled to purchase and retain any fee farm rents, or other rents therein mentioned, to them and their successors, notwithstanding any statutes of mortmain.

By statute 5 & 6 Will. & Mary, c. 20, s. 20, their majesties were empowered to incorporate certain subscribers and contributors, their heirs, successors, or assigns, to be one body corporate and politic, by the name of *The Governor and Company of the Bank of England*, and by that name to have perpetual succession, and a common seal; and that

(*i*) See other acts as to building churches: 59 Geo. III. c. 134; 3 Geo. VI. c. 72; 7 & 8 Geo. IV. c. 72; 1 & 2 Will. IV. c. 38; 2 & 3 Will. IV. c. 61.

(*k*) See Wells's Hist. of Bedford Level, vol. i. 526.

they and their successors, by the name aforesaid, should be able and capable in the law to have, purchase, receive, possess, enjoy and retain, to them and their successors, lands, rents, tenements and hereditaments of what kind, nature or quality soever; and also to sell, grant, demise, alien or dispose of the same, and by the same name to sue and be sued; and by statute 8 & 9 Will. III. c. 20, s. 26, other subscribers were incorporated with the company, with a similar power to purchase and dispose of lands.

The governor and company of the *Royal Exchange Assurance*, and of the *London Assurance*, are enabled by 6 Geo. I. c. 18, to purchase, take and enjoy lands not exceeding the value of 1000*l. per annum*, and to grant, alien, demise or dispose of the same, or any part thereof, at their free wills and pleasures; and by 11 Geo. IV. and 1 Will. IV. c. 74, the same companies, and their successors, are enabled to purchase annuities upon lives, and to lend money or stock upon mortgage, and are authorized to hold lands under the act without license in mortmain.

By statute 26 Geo. II. c. 22, s. 14, it was declared, that for the better execution of the purposes of that act, the trustees thereby appointed should be a body politic and corporate in deed and in name, and have succession for ever, by the name of *The Trustees of the British Museum*; and should also have the power, capacity and ability to purchase, take, hold and enjoy, for the purposes of that act, as well goods and chattels as lands, tenements and hereditaments, so as the yearly value of such lands should not exceed 500*l.* above all charges and reprizes; the statute of mortmain, or any other law or statute to the contrary thereof, in anywise notwithstanding (*l*).

(*l*) The following statutes relate to the British Museum: 5 & 6 Anne, c. 30 (Cottonian Library); 26 Geo. II. c. 22 (making one general repository for Sir H. Sloane's Museum, the Harleian Collection, and Cottonian Library); 27 Geo. II. c. 16, s. 3 (election of trustees); 28 Geo. II. c. 3 (private act for vesting buildings); 7 Geo. III. c. 18 (enabling the trustees to sell and exchange duplicates of books, &c.); 39 Geo. III. c. 73 (exemption of specific legacies from duty); 45 Geo.

By the 3rd section of the statute 5 Geo. IV. c. 39, it is enacted, that the trustees of the *British Museum* shall, for the purposes of the several acts relating to the same, and for the enlargement, improvement, and better endowment of the said museum, and for any purposes connected with the said museum, have full power, capacity, and ability to purchase, take, hold and enjoy any lands, and to accept any gifts, grants, devises and bequests of lands, and of any interest therein, and of any money issuing out of, or charged upon, or to arise from the sale of lands, to any value and amount whatsoever, notwithstanding the statutes of mortmain.

By statute 4 & 5 Will. IV. c. 88, certain persons who had subscribed, or should thereafter subscribe for making a railway from London to Southampton, were incorporated by the name of *The London and Southampton Railway Company*, with power to purchase lands to them and their successors and assigns for the use of the undertaking, without incurring any of the penalties or forfeitures of mortmain; with full power to sell and demise or otherwise dispose of the said lands, in manner directed by the act. Many other corporations have been created for similar purposes by several modern acts of Parliament, with power to purchase and hold lands without incurring the forfeitures of mortmain (*m*).

III. c. 127 (to vest Townleian Collection in the trustees, for the use of the public); 47 Geo. III. sess. 2, c. 36 (to enable trustees to sell and exchange articles); 56 Geo. III. c. 99 (to vest Elgin Collection of Marbles in trustees, for use of the public); 5 Geo. IV. c. 39 (appointment of additional trustees, &c.); 5 Geo. IV. c. 60 (to carry into effect the bequest of R. P. Knight, Esq.); 2 Will. IV. c. 46 (to enable the king to appoint a trustee); 3 Will. IV. c. 4, s. 18 (Private act, enabling Sir J. Soane to bequeath his museum to the British Museum).

(*m*) References to Private Acts on this subject will be found in Bramwell's Table of the Private Statutes. See *ante*, p. 26.

CHAPTER II.

OF CHARITABLE AND SUPERSTITIOUS USES AND TRUSTS.

SECT. I.—*Of Uses and Trusts which are Charitable.*
II.—*Of Uses and Trusts which are not Charitable.*
III.—*Of Superstitious Uses and Trusts.*

SECTION I.

Of Uses and Trusts which are Charitable.

1. *General Observations on the Term Charity.*
2. *Gifts to the Poor*, p. 62.
3. ——— *Poor Relations*, p. 63.
4. *Gifts for the advancement of Learning*, p. 68.
5. ——————————— *Religion*, p. 70.
6. ——— *General and Public Purposes*, p. 75.

1. *General observations on the term charity.*] It is principally necessary to consider what gifts come under the denomination of *charitable uses*, since the powers given by the statute 43 Eliz. c. 4 have fallen into disuse, for the purpose of determining what conveyances, devises and bequests come within the operation of the statute 9 Geo. II. c. 36 (*n*), prohibiting gifts "in trust or for the benefit of any *charitable uses* whatsoever;" and for deciding when an information in the name of the Attorney General can be sustained in a court of equity, which has an inherent jurisdiction to administer trusts relating to charitable gifts, according to the rules peculiarly applicable to them.

(*n*) See *post*. Chap. iii.

Charity, in its widest sense, denotes all the good affections which men ought to bear towards each other (*o*); in its most restricted and common sense, relief of the poor. But it is not employed in either of those senses in English courts of justice, where its signification is derived chiefly from the statute 43 Eliz. c. 4. Those purposes are considered charitable which are enumerated in that act, or which by analogies are deemed within its spirit and intendment; and to some such purpose every bequest to charity will generally be applied (*p*). Where a testatrix by her will gave certain legacies, and in a codicil used these words, "If there is money left unemployed, I desire it may be given in charity;" it was held, that the general residue of her personal estate was well given to charity, although no objects were mentioned (*q*).

Where there is a gift to charity in general, whether it is to be executed by individuals selected by the testator himself, or by the king as *parens patriæ*, it is the duty of such trustees on the one hand, and of the crown upon the other, to apply the money to charity in the sense which the determinations have affixed to that word in the Court of Chancery; *viz.*, either to such charitable purposes as are expressed in the statute 43 Eliz. c. 4, or to analogous purposes (*r*).

Public charities are hardly distinguishable from private; the charter of the crown does not make a charity more or less public, but only more permanent than it otherwise would be; but it is the extensiveness which will constitute it a public one. A devise to the poor of a parish is a public charity. So where testators, not having any particular persons in their contemplation, leave funds to trustees who are to have a discretion in selecting the objects; though such persons are private, and each particular object may be said to be private, yet in the extensiveness of the benefit accruing from them, they may very properly be called public charities. A sum to be disposed of by A. B. and his executors at their discretion,

(*o*) 1 Epist. Cor. c. xiii.

(*p*) 9 Ves. 405; 10 Ves. 541; 2 Vern. 387.

(*q*) *Legge* v. *Asgill*, Turn. & Russ. 265 n. See *Vezey* v. *Jamson*, 1 Sim. & Stu. 69; *post*. sect. ii.

(*r*) *Morice* v. *Bishop of Durham*, 10 Ves. 541.

among poor housekeepers, is of this description (*s*). A bequest of money to put out children apprentices, as the testatrix's brother should think fit, was held to be a public charity within the statute 8 Anne, c. 9, s. 40, which exempts from stamp duty money paid in respect of an apprentice "by or out of any public charity" (*t*).

The following charitable uses are enumerated in the preamble to the statute 43 Eliz. c. 4; "relief of aged, impotent and poor people—maintenance of sick and maimed soldiers and mariners (*u*)—schools of learning—free schools and scholars in universities—for repair of bridges, ports, havens, causeways, churches, sea banks and highways—for education and preferment of orphans—for or towards relief, stock or maintenance for houses of correction—for marriages of poor maids—for supportation, aid and help of young tradesmen, handicraftsmen, and persons decayed—for relief or redemption of prisoners or captives—and for aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers, and other taxes."

The subjects of such gifts mentioned in the same statute are lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money and stocks of money, theretofore given or thereafter to be given, limited, appointed or assigned.

It has been said, that although there is no statute in Ireland corresponding with the statute of 43 Eliz. c. 4, yet that act has been adopted in that country for the purpose of ascertaining what are to be considered as charitable uses there (*w*).

(*s*) *Attorney General* v. *Pearce*, 2 Atk. 87; *S. C.* Barn. 208.

(*t*) *Rex* v. *Clifton upon Dunsmore*, Burr. Settl. C. 697.

(*u*) It is said, that soldiers included either voluntary or pressed, or an alien who had been in the English service, but not voluntary victuallers, nor the wives, children, or servants of soldiers; and that mariners included all necessary servants in a ship, Duke, 103, (127).

(*w*) 6 Dow. 136; 1 Molloy, 95, 618. By the Irish statute 10 Charles I. sess. 3, c. 1, the archbishops and bishops of that kingdom may be compelled in Chancery, or by petition to the Council Board, to perform the trusts of any lands conveyed to them by James I., or by Charles I. and his successors, or by any other corpo-

Many gifts not intended for the objects mentioned in the statute 43 Elizabeth, c. 4, have been determined to be charitable uses within the equity of that act, and to come under the jurisdiction of the Court of Chancery as such. There seems, however, to be no case in which a bequest has been held charitable where the testator has neither used the word *charity* to denote his general object, nor specified some particular purpose which the Court has determined to be charitable in its nature (*x*).

Almost all charities which are to be administered in the Court of Chancery, have one of four objects in view. 1st, relief of the poor in various ways, as by money, provisions, education, medical assistance, &c.; 2nd, the advancement of learning; 3rd, the advancement of religion; and 4th, the advancement of objects of general public utility.

2. *Gifts to the poor.*] Charity has been defined to be a gift to a general public use, which extends to the poor as well as to the rich (*y*). Poverty is the principal and essential circumstance for bringing a gift within the words, "for relief of aged, impotent, and poor people," in the statute 43 Elizabeth, c. 4; for a gift to the aged of such a parish, or to the impotent of such a parish, without expressing their poverty, is not within the act, because they may be rich. But a gift to the poor, without expressing age or impotency, is good enough; for poverty alone is sufficient subject for charity to work

rations or persons, for the following purposes: "For the erection, maintenance or support, of any college, school, lecture in divinity, or in any the liberal arts and sciences; or for the relief or maintenance of any manner of poor, succourless, distressed or impotent persons; or for the building, re-edifying, or maintaining in repair, any church, college, school or hospital; or for the maintenance of any minister and preacher of the holy word of God; or for the erection, building, maintenance or repair of any bridges, causeways, cashes, paces, and highways within that realm; or for any other like lawful and charitable use and uses, warranted by the laws of that realm, then established and in force;" which shall be taken and construed to be good and effectual in the law.

(*x*) 9 Ves. 504; 10 Ves. 546.

(*y*) *Jones* v. *Williams*, Ambl. 651.

upon. So a gift to all the aged and impotent of such a parish, not assessed in the subsidy, is charitable; for those not so assessed are poor within the intent of the statute. So a gift of money to make a stock to bind apprentices, the children of such men as are not in the subsidy of goods, and relieve bastards, is a charitable use; because they are like orphans, having (by intendment of law) no parents to relieve them (*x*).

The following bequests have been decided to be charitable: "for the relief of the poor of a parish" (*a*); "to the poor maintained in an hospital" (*b*); "to the master and governors of an hospital" (*c*); "to the widows and orphans of the parish of Lindfield, Sussex" (which was construed the *poor* widows and orphans) (*d*); "to the widows and children of seamen belonging to the town of Liverpool" (*e*). So a bequest to a parish generally, without directing any particular use, was decreed to the poor of the parish (*f*). But where the gift is *to the poor* indefinitely, which in common construction extends to all the poor in England, the king will have the disposal of the fund (*g*).

Gifts to build houses for the poor, with four acres of land to a cottage; to make conduits to almshouses; to maintain a common laundress, or a chaplain, for the poor of such houses; to build a house to which the poor may resort to receive their alms, &c.; to provide them weapons for the defence of their houses, but not to wear abroad for ostentation; and to increase the diet of almsmen upon festival days; are all mentioned by Sir F. Moore as charitable uses (*h*).

(*x*) Duke, 132 (125); Com. Dig. Uses (s).

(*a*) *Woodford* v. *Parkhurst*, Duke, 70 (378).

(*b*) *Corporation of Reading* v. *Lane*, Duke, 81, 111 (361).

(*c*) *Mayor of London's* Case, Duke, 83, 111 (380).

(*d*) *Attorney General* v. *Comber*, 2 Sim. & Stu. 93.

(*e*) *Powell* v. *Attorney General*, 3 Mer. 48.

(*f*) *West* v. *Knight*, 1 Ch. Cas. 134; *Champion* v. *Smith*, Duke, 81 (622). By the civil law, under such a devise, the poor of the hospital of the parish where the testator lived, would have been entitled; and if there was no hospital, then the poor of such parish generally. 2 Domat, 169.

(*g*) *Attorney General* v. *Peacock*, Finch, 245; *Attorney General* v. *Matthews*, 2 Lev. 167.

(*h*) Duke, 132, 133 (126).

A bequest of Bank Annuities to the poor inhabitants of St. Leonard, Shoreditch, was held good; but as the word inhabitant might extend to every body living in the parish (*i*), and as it could not be intended that the poor inhabitants who were relieved by the parish should have the benefit of the legacy, which in effect would be giving to the rich and not to the poor, the Court declared, that the distribution of the legacies was to be confined to the poor inhabitants of that parish not receiving alms, according to a scheme to be approved by the master (*k*).

A legacy given to the poor, by a will containing no words shewing what poor the testator, who was a French refugee, meant, was ordered to be given to the poor refugees (*l*).

A conveyance of lands to trustees and their heirs, "in trust for the churchwardens and overseers of the poor and inhabitants of the parish of St. Owen, for the time being, to the intent that the rents and profits might be paid and applied for their use and benefit, from time to time, in aid of the rate for the relief of the poor," was held to be for a charitable use (*m*).

3. *Gifts to poor relations.*] An immediate bequest to "poor relations," must be applied to the use of such poor relations only as come within the degrees prescribed by the Statute of Distributions (*n*); but a donation in the same terms,

(*i*) The word inhabitants of any county, city, or other place, either in its strict or popular sense, means those persons who are dwelling therein. *Rex* v. *Hall*, 1 Barn. & Cr. 136; *S. C.* 2 Dowl. & Ryl. 246. See *Fearon* v. *Webb*, 14 Ves. 13.

(*k*) *Attorney General* v. *Clarke*, Ambl. 422.

(*l*) *Attorney General* v. *Rance*, Ambl. 422.

(*m*) *Doe* d. *Preece* v. *Howells and others*, 2 Barn. & Ad. 744.

(*n*) 22 & 23 Charles II. c. 10. See the following cases, on this subject: *Thomas* v. *Hole*, Cas. Temp. Talb. 251; *Green* v. *Howard*, 1 Br. C. C. 31; *Widmore* v. *Woodroffe*, Ambl. 636; *Whithorne* v. *Harris*, 2 Ves. sen. 527; *Edge* v. *Salisbury*, Ambl. 70; *Carr* v. *Bedford*, 2 Rep. in Ch. 77; *Griffith* v. *Jones*, Id. 179, 2 Freem. 96; *Jones* v. *Beale*, 2 Vern. 381, *Anon.*, 1 P. Wms. 327; *Roach* v. *Hammond*, Prec. in Ch. 401; *Attorney General* v. *Buckland*, cited Ambl. 71, 1 Ves, sen. 231; *Harding* v. *Glyn*, 1 Atk. 469;

if intended to found an endowment of permanent duration, will be supported as a charity in favour of all such relations of the testator as are poor and proper objects.

A gift of the produce of land directed to be sold, and to be distributed unto 20 of the poor of the testator's kindred, although it did not appear that he had any, was said to be charitable (*o*).

So, a bequest of a personal fund, consisting of about 3000*l.* stock, for the purpose of putting out "our poor relations apprentices," which was afterwards confined by a codicil to two families, was held a charitable gift, and the decree directed such of the objects as were ready, to be put out apprentices; and the fund to be laid out from time to time, with liberty to apply to the Court (*p*).

Again, where a testator, by will dated 3rd August, 1725, bequeathed to his eldest sister an annuity of 50*l.* during her life, and after her decease he gave the same unto his own and his wife's poorest relations, to be distributed and paid to them and such of them proportionably, share and share alike, at the discretion of his executors: he also gave an annuity of 10*l.* to another sister during her life, with a similar disposition over, after her decease: the testator also gave the interest of his stock to his wife, and after her decease one half-year's interest to one poor relation of his own, either male or female, for a portion in the way of marriage, and putting him or her out in the world; and the other moiety in the same manner to one poor relation of his wife's; the direct management thereof to be left to the discretion of his executors; and if his own and his said wife's relations should be extinct, then he gave the said stock and securities, and the produce, as therein mentioned:—on a bill filed by the trus-

Bennett v. *Honeywood*, Ambl. 708; *Supple* v. *Lowson*, Ambl. 729; *Rayner* v. *Mowbray*, 3 Br. C. C. 234; *Stamp* v. *Cooke*, 1 Cox, 234; *Masters* v. *Hooper*, 4 Br. C. C. 207; *Hands* v. *Hands*, 1 T. R. 437 n.; *Devisme* v. *Mellish*, 5 Ves. 529; *Mahon* v. *Savage*, 1 Sch. & Lef. 111; *Pope* v. *Whitcombe*, 3 Mer. 689; *Brandon* v. *Brandon*, 3 Swanst. 319, 1 Roper on Leg. 91—109, 3rd ed.

(*o*) *Goffe* v. *Webb*, Duke, 80 (361); *S. C.* Toth. 20.

(*p*) *White* v. *White*, 7 Ves. 423.

tees under the will, against the Attorney General and some of the poor relations, a decree was made, declaring that the charity should be established; and directing an account of the arrears and growing payments of the annuities, and of the dividends of the stock, &c., with liberty for any of the parties to lay a scheme before the master for carrying the said charity into execution, according to the intention of the will; and an inquiry whether some of the defendants were poor relations of the testator; with liberty to any other poor relations of him or his late wife, to go before the master to claim such benefit as they might be entitled to under the charitable bequest in the will (*q*).

So where a testator by will dated 3rd August, 1581, devised all his messuages, lands, &c., to his wife for 40 years, if she should so long live, and after her death to Evan Johnes and his heirs, with the following direction—"Also, that he, the said Evan Johnes, shall, at what time soever the possession of the same premises shall fall and come to him by virtue of this my will, yearly, from thenceforth, he the said Evan Johnes, and his heirs, shall for ever divide and distribute, according to his and their discretion, amongst my poor kinsmen and kinswomen, and amongst their offspring and issue which shall dwell within the county of Brecon, the sum of 20*l.* by the year, without fraud and collusion." On an information and bill filed by three poor relations of the testator, on the behalf of themselves and all others, the answer to which submitted that the devise was void for uncertainty, the gift was held to be in the nature of a charitable bequest, for it was to have perpetual continuance in favour of a particular description of poor, and was not like an immediate bequest among poor relations; and an inquiry was directed, whether the plaintiffs were poor relations of the testator, and whether there were any others of his poor relations who dwelt within the county of Brecon (*r*).

(*q*) *Isaac* v. *De Friez*, Ambl. 595; Ambl. 507. Reg. lib. (A) 1753, stated in 17 Ves. 373 n.; See *Brunsden* v. *Woolridge*, (*r*) *Attorney General* v. *Price*, 17 Ves. 371.

In *Blandford* v. *Thackerell* (*s*), a trust for establishing a school for the education of the children and grandchildren of relations of the testator, named by him, and for other children, being void, on account of a direction to purchase land, was established so far as it provided for the education of the children and grandchildren of any of the stocks named in the will in existence at the testator's death.

It was decided, in a case of appeal from Scotland, to be competent for a party by deed to point out particular classes of persons which are intended to be the objects of his favour, and then to leave it to an individual or a body of individuals after his death, to select out of those classes the particular individuals or the particular objects to whom the bounty of the testator shall be applied. Where a Scotch testamentary instrument directed the residue of an estate to be applied in such charitable purposes, and in bequests to such of the donor's friends and relations, as might be pointed out by his wife, with the approbation of a majority of his trustees; and in the event of her decease or entering into a second marriage before such approbation should have been pointed out and approved of as aforesaid, then he empowered the majority of the remaining trustees to make the application in the way and manner they would conceive to be most agreeable to his wishes if in life; it was held, that the trustees might dispose of the property among certain classes of persons, or among particular objects, subject to the intention expressed by the donor, the creator of the trust, notwithstanding the generality of the disposition (*t*).

In some cases of gifts to "poor relations," or "to relations, the greatest objects of charity," the fund has been distributed by the order of the Court of Chancery amongst objects coming within that description, to the exclusion of other relations.

Where it appeared that one Ward in his lifetime gave

(*s*) 2 Ves. jun. 238; *S. C.* 4 Bt. C. C. 394.

(*t*) *Crichton* v. *Grierson*, 3 Bligh, N. S. 424; *S. C.* 3 Wils. & Shaw, 329.

4600*l.* South Sea bonds to a legatee under his will, and made a memorandum in his waste book, "of having given that sum to the legatee to dispose of according to my directions to him," and after the death of such legatee, a letter from him was found directed to his executrix, wherein he acknowledged, that the sum of 4600*l.* South Sea bonds was given him to assist Ward's poor relations, and begged her to accept of the trust after his death, and out of the *interest* and *produce* thereof, he begged her chiefly to assist certain persons therein mentioned; on an information brought at the relation of one of Ward's poor relations, Lord *Hardwicke* said he did not know any instance where the Court of Chancery in any case of charity whatever, had taken to themselves an arbitrary disposition, as to confine it to a gift of the interest and produce only, when there is no more certainty of the donor's giving the capital than the interest, but it was left quite obscure and in the dark. It was decreed, that the gift of 4600*l.* South Sea bonds, was a gift of the principal and interest of that fund for the benefit of Ward's poor relations, and the master was directed to inquire who came under the description of the donor as proper objects of the charity (u).

Where a testator gave "2000*l.* to such of his nearest relations of the family of the *Edges*, as his executors should think the *greatest objects of charity*, in such manner and proportion as they or the survivor, &c. should think fit, and desired them to take the advice and direction of his sister (who was his only next of kin), in the distribution thereof, if she should be living;" it was decreed, that the next of kin of the testator of the family of *Edges*, who would have been entitled to distributive shares of his personal estate, within the Statute of Distribution, in case he had died intestate, ought to be construed as intended by the description of nearest relations in the bequest in question, and that the executors, with the advice of the sister, had the power of

(u) *Attorney General* v. *Bucknall*, 2 Eq. Cas. Abr. 194, pl. 15; *S.* . 7 Ves. 58. *General* v. *Doyley*, 2 Atk. 328; Reg. Lib. (A) 1741, fol. 636; Sand. n.; See *Attorney*

judgment, which of such persons were the greatest objects of charity, and that the sister was not to be considered as one of such objects within the intention of the testator's will. The executors were directed, with the advice of the sister, to lay before the master a list of such of the testator's nearest relations within the above description, as they judged to be the greatest objects of charity. The master was directed to ascertain whether the persons mentioned in the list came within the above description, and to distribute the fund amongst such persons as should be ascertained to come within the description (*v*).

4. *Gifts for the advancement of learning.*] Gifts for the advancement of useful learning are said to be the most meritorious that can be bestowed, because they afford the means of educating great natural abilities, which may be employed for the benefit of the whole community (*w*). "No time, observes Lord *Coke* (*x*), was ever so barbarous as to abolish learning and knowledge, nor so uncharitable as to prohibit relieving the poor."

(*v*) *Goodinge* v. *Goodinge*, 1 Ves. 231; Belt's Suppl. 128, 2nd ed.

(*w*) Wilmot's Notes, 25.

(*x*) 1 Rep. 24 a.; 11 Rep. 71. The great argument for literary endowments is founded on the want, or the weakness of the natural appetency for literature in our species. There is not that spontaneous demand for it which would be effective to the bringing forth of an adequate supply; and the higher the literature is, the more it is placed above the reach of any such effective demand. This is not a subject on which we can with safety wait for mankind, but a subject on which mankind need to be assailed with offers, or which they must be beckoned to approach by all the signals and facilities of invitation. The importunity is not, as in many other things, on the side of the customers who receive, but the importunity must be on the side of the sellers or the providers who bestow. Rather than want the articles of ordinary merchandise, men will give a price for them above their prime cost, so as to afford a profit. But science is not one of these articles, and will infallibly languish and be neglected, unless it is pressed on the acceptance of men at a price greatly below prime cost, and the purpose of endowments is to make up the difference. The operation of these is exemplified in miniature, when a munificent patron of literature or the arts, aids the

Devises and bequests, having for their object the establishment of learning, are considered charitable uses within the statute 43 Eliz. c. 4. Of this description are devises to a college generally for their benefit, to increase the foundation, and to advance the end of the institution; as, to augment a headship or fellowship, or to found a new one (*a*).

A gift to certain officers of Christ's College, to maintain certain students there, in the sciences of physic and divinity; and four students of the law at Lincoln's Inn; and also certain pensioners, *viz.* decayed merchants, soldiers, and clergymen, who should reside in the donor's house at W.; were held charitable uses within the statute of 43 Eliz. c. 4 (*b*). So, devises of land to the masters and fellows of a college

publication of those massive and expensive folios, for which the demand is so limited, that all the money given by the purchasers would amount to but a fraction of the cost. It is to his largess, that the world is indebted for all the delight or instruction which this publication affords. So is it likewise with the expense of an educational apparatus; and more especially, when the education is of a lofty scientific character. The scholars do not yield the full remuneration; and, but for the benefactor, there would have been no such scholarship.

It is mainly by the same argument, that we would vindicate the policy of ecclesiastical endowments. The necessity for the one is founded on the natural want or weakness of the literary appetite; and the necessity for the other, is founded on the natural want or weakness of the spiritual appetite. — Chalmers on Endowments, 61—63.

Much of the useful learning which has so remarkably enlightened the middle ranks of the English nation, and rendered us a moral and an understanding people, has proceeded from our numerous public schools. It is in these truly respectable nurseries of literature, that education has effected its most generous and valuable purposes. The mind, which might otherwise have been confined by sordid habits, has been expanded; genius, which might have been hidden from the world, has been called forth to the honour of human nature; and the general manners, from rudeness and vulgarity, have been rendered easy, courteous, and polite. — Wilson's Hist. of Merchant Taylors' School, Part II. p. 545. See 1 Gibbon's Miscel. Works, p. 37, 8vo. ed.

(*a*) *Attorney General* v. *Whorwood*, 1 Ves. sen. 537. See *Porter's* case, 1 Rep. 25 b.

(*b*) Case of *Christ's College, Cambridge*, 1 Bl. R. 90; *S. C.* 1 Eden, 10; Ambl. 351.

in Cambridge (*c*); to a college, to find a scholar (*d*); to Jesus College, Oxford, and their successors, "to find a fellow there, which should be of the testator's blood and alliance" (*e*); "to support a lecturer in polemical or casuistical divinity in the University of Cambridge" (*f*): were all held to be charitable uses. Of the same description are gifts of lands to maintain the schoolmaster of a town (*g*), or to build a school (*h*), or to erect a free grammar school (*i*).

The institution of a school for the sons of gentlemen, is not, in popular language, a charity; but in the view of the statute of 43 Eliz. c. 4, all schools for learning are so to be considered (*j*).

Trusts for educating persons in the Roman Catholic religion were, until recently, illegal (*k*); but by statute 2 & 3 Will. IV. c. 115, Roman Catholics are placed, with respect to their schools, upon the same footing as Protestant Dissenters (*l*).

An institution established by the Legislature for the collection and preservation of objects of science and of art, partly supported at the public expense, and partly from individual liberality, and intended for the public improvement, as the British Museum, is in the nature of a charitable institution; and therefore a gift of the produce of land and the residue of personal estate, to the trustees of that institution, to be employed for its benefit, was held to be charitable (*m*). Although it is laid down that schools for dancing and fencing

(*c*) *Plate* v. *St. John's College*, Duke, 77, 111, (379).

(*d*) *Rex* v. *Newman*, 1 Lev. 284.

(*e*) Case of *Jesus College*, Duke, 78, 111, (363); *Flood's* case, Hob. 136.

(*f*) *Attorney General* v. *The Margaret and Regius Professors in Cambridge*, 1 Vern. 55.

(*g*) *Hynshaw* v. *The Corporation of Morpeth*, Duke, 69, (242).

(*h*) Case of *Rugby School*, Duke, 80, 112, (633).

(*i*) *Gibbons* v. *Maltyard*, Poph. 6, Duke, 111.

(*j*) *Attorney General* v. *Earl of Lonsdale*, 1 Sim. 109.

(*k*) *Cary* v. *Abbot*, 7 Ves. 490; See Butl. Co. Litt. 391 a., n., s. 2.

(*l*) See *post.* sect. iii. 3, 6.

(*m*) *The Trustees of British Museum* v. *White*, 2 Sim. & Stu. 594.

were not of that kind, because they are matters of delicacy, not necessity (*n*).

5. *Gifts for the advancement of religion.*] Money given for the good of the church of a parish (*o*), or for repairing a church, are charities established by the statute 43 Eliz. c. 4; and where a testator gave 500*l.* to the parish church of St. Helen's, London, which is an impropriation, on a question who was to have the benefit of the legacy, between the vicar and the churchwardens, it was decreed to the latter, for repairing and adorning the church (*p*).

Chapels are included within the words, "*repair of churches;*" in the statute 43 Eliz. c. 4, and church comprehends all convenient ornaments and conveniences for the decent and orderly administration of divine service—as for the making of a new or repair of an old pulpit, the buying of a pulpit-cushion or pulpit-cloth, or the setting up of new bells where there are none, or amending them where they are out of order (*q*); for reparation of churches are but preparations for the administration of divine service (*r*).

A direction to find for ever a minister to preach the word of God in the church of St. Mary, Thetford, four times in a year, and to give him 10*s.* for every sermon (*s*); bequests to the curate of a parish, to preach a sermon on Ascension-day; to the clerk of the parish, to keep the chimes of the church in repair, and to play certain psalms; and for a payment to be made to the singers who sat in the gallery of the church; are all bequests to charitable uses within the statute 43 Eliz. c. 4, and if payable out of real estate, void within the statute 9 Geo. II. c. 36 (*t*).

Although a stipend for keeping up an organ, and for the organist, was established, Lord *Hardwicke* refused to establish

(*n*) Duke, 134, (128).

(*o*) *Wingfield's* Case, Duke, 80, (374).

(*p*) *Attorney General* v. *Ruper*, 2 P. Wms. 125; See *Attorney General* v. *Vivian*, 1 Russ. 226.

(*q*) Duke, 109.

(*r*) Duke, 131, (124).

(*s*) *Gibbons* v. *Maltyard*, Poph. 6, Duke, 111.

(*t*) *Turner* v. *Ogden*, 1 Cox, 316.

an annuity given to choristers as a charitable use, on the ground that it was contrary to the constitution of the church of England to have them in parochial churches, where they would be under no rule of government as in other churches, and the law would not allow them to be under the government of the heir at law (*u*); Lord *Kenyon* dissented from this opinion, and said, that singing psalms was part of the religious service, though not so useful as the sermon (*x*).

Where a testator directed the remainder of certain lands to be a fund, for a perpetual annuity of 10*l.* per annum to a minister, to preach a sermon once a year to his memory, to keep his tomb-stone in repair, and the inscription thereon and upon the stone against the wall, reciting the gift legible, of which the minister was then to make oath; and 2*l.* per annum to the clerk, and 2*l.* more to the sexton, for ever; with 4*l.* per annum to the mayor and corporation of St. Alban's, for managing and keeping account thereof, the three first gifts were held to be charitable gifts; and although the gift to the corporation, was a reward for a service, and but a circumstance attending the charitable bequest, yet being attendant on a void charity, it failed also (*y*).

Trusts for maintaining and keeping in repair family vaults or tombs are charitable (*z*).

Money given to maintain a *preaching minister* is a charitable use (*a*). Although it is said by Sir *F. Moore*, that a gift of lands, &c., to maintain a chaplain or minister to celebrate divine service, is neither within the letter nor meaning of the statute 43 Elizabeth, c. 4; for it was purposely omitted in the penning of that act, lest the gifts intended to be employed for purposes grounded upon charity, might, in change of times (contrary to the minds of the givers), be confiscate

(*u*) *Attorney General* v. *Oakaver*, cited 1 Ves. sen. 535, 536.

(*x*) 1 Cox, 317.

(*y*) *Durour* v. *Motteux*, 1 Ves. sen. 320.

(*z*) *Jones* v. *Mitchell*, 1 Sim. & Stu. 290; *Doe* d. *Thompson* v. *Pitcher*, 3 Maule & S. 407; *S. C.* 2 Marsh. 61, 6 Taunt. 359; See *post*, pp. 86, 87.

(*a*) *Pember* v. *Inhabitants of Knighton*, Duke, 82, 109, (381), Toth. 34, Poph. 139; *Penstred* v. *Payer*, Duke, 82, (381), 1 Rep. 26 a; 1 Eq. Cas. Abr. 95, pl. 3.

into the king's treasury; for religion being variable, according to the pleasure of succeeding princes, that which at one time is held for orthodox, may at another be accounted superstitious; and such lands are confiscated by the statute 1 Edward VI. c. 14, s. 11 (*o*).

A bequest for the distribution of books for the increase and improvement of Christian knowledge (*p*), and for the advancement of the Christian religion among infidels (*q*), are charitable gifts. Money given to maintain a preaching minister (*r*), and devises for the benefit of the ministers of Protestant Dissenters and Quakers (*s*), are charitable uses.

A pension settled for the benefit of a perpetual curate is a charitable use, in respect of which an information may be maintained in the name of the Attorney General (*t*).

Augmentations made by ecclesiastical persons to small vicarages and curacies, under the statute 29 Charles II. c. 8, are charitable uses; the seventh section of that act providing, that if any question should thereafter arise concerning the validity of such grants, or any other matter or thing in that act contained, such favourable constructions and such further remedies, if need be, should be had and made, for benefit of the vicars and curates, as theretofore had been had and made, or might be had for other charitable uses, upon the statutes for charitable uses. An augmentation, made by a sinecure rector in 1674, of 30*l. per annum*, to be divided between the vicar and curate as the bishop should think fit, who decreed 10*l.* to the vicar for ever, and 20*l.* to the curate for ever, was held a charity, so as to enable the curate to proceed by information in the Attorney General's name (*u*).

Pious uses are a branch of charity, and as such have

(*o*) Duke, 131, 132, (125).

(*p*) *Attorney General* v. *Stepney*, 10 Ves. 22.

(*q*) *Attorney General* v. *City of London*, 1 Ves. jun. 243.

(*r*) *Pember* v. *Inhabitants of Knighton*, Toth. 34, Duke, 82, 109, (381).

(*s*) *Attorney General* v. *Cock*, 2 Ves. sen. 275.

(*t*) *Attorney General* v. *Parker*, 1 Ves. sen. 43; See 14 Ves. 7.

(*u*) *Attorney General* v. *Brereton*, 2 Ves. sen. 426.

been recognized and carried into effect by the Court of Chancery (*v*). A bequest of the residue, to be laid out by executors for charitable and other *pious* and *good uses*, at their discretion, recommending that the greater part should be employed for the advancement of the Christian religion among the infidels, was held a charitable bequest (*x*). So also was a gift to be applied to charitable and pious uses generally (*y*). A bequest to God is a charitable gift, to be paid to the parish church where the testator resided at the date of his will (*z*). A bequest to trustees to lay out at their discretion 2000*l*. *per annum*, till the testator's son came of age, "in the service of my Lord and Master, and I trust Redeemer;" was held to be a good charitable gift, to be applied at the discretion of the trustees, under the control of the court (*a*). A provision for preachers of a chapel is a charitable use; although mixed with personal bounty and favour to particular legatees, if the benefit is bestowed on them only in respect of their conduct in the charitable institution. (*b*).

Trusts for the support of religious establishments which come within the Toleration Act, are considered charitable (*c*). Thus a bequest of money for the benefit of the preacher or preachers for the time being, who should officiate in a chapel which the testatrix had established in her lifetime, was held to be a charitable use within the mortmain act (*d*). So a trust for a society or congregation of Protestants, assembling under the patronage of the late Countess of Huntingdon's College, is a charitable use (*e*); if not a superstitious use within the 23rd Henry VIII. c. 10 (*f*); a gift to support that college is also

(*v*) *Clifford* v. *Francis*, 1 Freem. 330; *Anon.* 2 Id. 40.

(*x*) *Attorney General* v. *City of London*, 1 Ves. jun. 243; *S. C.* 3 Br. C. C. 171.

(*y*) *Attorney General* v. *Herrick*, Ambl. 712.

(*z*) Godolp. Orp. Leg. 273. See 2 Domat, 168—170.

(*a*) *Powerscourt* v. *Powerscourt*, 1 Molloy, 616.

(*b*) *Grieves* v. *Case*, 2 Cox, 301, 311; *S. C.* 1 Ves. jun. 548.

(*c*) See *post*. sect. iii. 3.

(*d*) *Grieves* v. *Case*, 4 Br. C. C. 67; *S. C.* 1 Ves. jun. 548; 2 Cox, 301.

(*e*) *Doe* d. *Wellard* v. *Hawthorn*, 2 Barn. & Ald. 97.

(*f*) Id. 103. See *ante*, p. 19.

a charitable use (*g*). So is a gift to the trustees of a chapel, used for the purpose of public worship by a society of Protestant Dissenters, which was duly licensed under the Toleration Act (*h*). And a conveyance of land to trustees and their heirs, so long as a meeting-house and burial-ground should be used by the society of quakers, as and for their meeting-house and burial-ground (*i*). A lease purchased by individuals, and assigned to trustees for the purposes of a dissenting chapel, or bequeathed for like purposes, is a charitable use, which the court is bound to execute (*k*).

Trusts for supporting places of worship for Roman Catholics were, until recently, against the policy of the law, and superstitious; but by the statute 2 & 3 Will. IV. c. 115, they are placed in that respect upon the same footing with Protestant Dissenters (*l*).

6. *Gifts for general and public purposes.*] Many gifts of a general nature for the advantage of the public have been decided to be charitable, although they benefit the rich as well as the poor. Thus for the improvement of the city of Bath (*m*); "for the repair of the highways of a parish" (*n*); "for bringing spring water from St. Arvans or elsewhere, to Chepstow, for the use of the inhabitants for ever" (*o*); to build a sessions-house for a county or city (*p*); or a house of correction (*q*); and a duty imposed by acts of Parliament on coal imported into the city or river of London (among other purposes), for re-building St. Paul's Cathedral after the fire of London (*r*), were held to be charitable uses. A direction

(*g*) *Shanley* v. *Baker*, 4 Ves. 732.

(*h*) *Corbyn* v. *French*, 4 Ves. 418; *Attorney General* v. *Cock*, 2 Ves. sen. 273.

(*i*) *Doe* d. *Thompson* v. *Pitcher*, 6 Taunt. 359.

(*k*) *Attorney General* v. *Fowler*, 15 Ves. 85.

(*l*) See *post*. sect. iii. 3, 6.

(*m*) *House* v. *Chapman*, 4 Ves. 542.

(*n*) *Eltham Parish* v. *Warreyn*, Duke, 67, (641); *Collison's* case, Hob. 136.

(*o*) *Jones* v. *Williams*, Ambl. 651.

(*p*) Duke, 109.

(*q*) Duke, 136, (130).

(*r*) See 19 Charles II. c. 3; 22 Charles II. c. 11; 1 James II. c. 15; 8 Will. III. c. 14; 1 Anne, st. 2, c. 12; 9 Anne, c. 22. 1 Swanst. 297.

to apply rents of an estate to such purposes as the testator's executors should think most conducing to the good of the county of Westmoreland, and especially of the parish of Lowther, was held to create a charitable use (*s*). A bequest of a residue for the benefit of such public and private charities as the testator's executors might think fit, and amongst others to establish a life-boat at Brighthelmstone, was held good (*t*). A devise of a botanical garden near Chelsea, to be kept up for ever, was held a charitable use, because the testator had said in his will that he thought it would be a *public benefit* (*u*).

Sir *J. Leach* said, "that funds supplied from the gift of the crown, or from the gift of the Legislature, or from private gift, for any legal public or general purpose, are charitable funds to be administered by courts of equity. It is not material that the particular public or general purpose is not expressed in the statute of Elizabeth; all other legal public or general purposes being within the equity of that statute. It is the source from whence the funds are derived, and not the mere purpose to which they are dedicated, which constitutes the use charitable; and funds derived from the gift of the crown, or the gift of the Legislature, or from private gift, for paving, lighting, cleansing and improving a town, are within the equity of the statute of Elizabeth, charitable funds to be administered by the Court of Chancery. But where an act of Parliament passes for paving, lighting, cleansing and improving a town, to be paid for wholly by rates or assessments to be levied upon the inhabitants of that town, the funds so raised being in no sense derived from bounty or charity in the most extensive sense of that word, are not charitable funds to be administered by the Court of Chancery." Therefore, where a common was inclosed under an act of Parliament, passed with the consent of the lord of the manor and the proprietors of lands who had rights of common on the waste in question, and was vested in commission-

(*s*) *Attorney General* v. *Earl of Lonsdale*, 1 Sim. 105.

(*t*) *Johnston* v. *Swann*, 3 Madd. 194.

(*u*) *Townley* v. *Bedwell*, 6 Ves. 457.

ers, upon trust to apply the rents for the improvement of a town, with power for them to levy a rate on the inhabitants in case the rents proved deficient; an information and bill being filed by some of the inhabitants, on behalf of themselves and the others against the commissioners, for an account of the rents, alleging misapplication, and that a rate levied was unnecessary, it was held, on a general demurrer—first, that the funds constituted a charity; and second, that the object of the suit being to avoid the rate, the plaintiffs had a right to sue on behalf of themselves and the other inhabitants. It was construed, in effect, as a gift of the lands by the lords and persons having rights of common, for the public purpose of improving the town, and that the funds given were therefore charitable funds, to be administered by the Court of Chancery (*v*).

Lord Chancellor *Hart* is reported to have expressed a doubt, in a case where the crown had granted to a corporation certain tolls, to be expended on the murage and pavage of a town, whether the Court of Chancery had ever construed as a charitable use, a gift from the crown for a particular purpose, even where such a gift from an individual would have been certainly so construed; particularly if the grant from the crown related to the defence of the realm, as for finding watch and ward of a castle; and that although a fund flowing from a private hand to repair walls, might by possibility have been held a charitable purpose, he thought the fact of the gift being from the crown would divest the charitable character. He also said, any man may out of his own property create a fund for charity; but it is a question whether the crown has the power to raise a fund for charity out of the pockets of the subject. The crown might grant its own lands with all its incidents; and in the case of the Corporation of *Limerick* (*x*) having granted lands, it had a right to impose a toll for passing through them; but if it had a right to originate a distinct unattached grant of tolls for charitable purposes, it might be hard to say what burthens

(*v*) *Attorney General* v. *Heelis*, 2 Sim. & Stu. 67, 76, 77.

(*x*) See *post*. p. 78.

the subject might have been exposed to. He said, whether tolls are within the statute of Elizabeth, was much discussed just before he left the bar; and he thought if the crown, being entitled to tolls, grants them as a charitable use, they are subject to all the incidents of other property so granted; but this is a different case, the crown having created them here *de novo*, and not granted existing tolls; this is a case which involves great difficulty (*y*).

It seems that a grant from the crown of certain privileges and property for the bettering of the city of Carlisle, and that the citizens thereof might be able to apply themselves to their business in the said city under greater tranquillity and in quiet, and might be the more fully animated to fortify and defend that city, if the city were specially committed to the custody of themselves; is a charitable gift (*z*).

Where an information was filed by the Attorney General of Ireland, at the relation of a freeman of the city of Limerick, in Ireland, against the chamberlain and lord mayor, sheriffs, and citizens or common council of that city—stating, that certain lands and revenues were granted to and vested in the corporation at large for divers public uses and purposes—the improvement of the city, and the preservation and support of public buildings, bridges, highways and establishments therein; that the defendants had usurped the powers of the whole corporate body; and that the chamberlain, in concert with the common council, had, contrary to the charter and immemorial usage, applied the revenues to their private purposes, without reference to the citizens and freemen at large in their general assembly of d'oyer hundred, &c.; and praying that the chamberlain might account, and that a receiver might be appointed. Demurrers for want of equity and jurisdiction over a civil corporation, even in a case of a misapplication of their revenues by them, and that the mayor, sheriffs and citizens had an absolute and unqualified right to dispose of their revenues and estates, and did not hold the same subject

(*y*) *Attorney General* v. *Corporation of Galway*, 1 Molloy, 103, 104, 108; *S. C.* 1 Beatty, 298.

(*z*) *Attorney General* v. *Mayor and Corporation of Carlisle*, 2 Sim. 437.

to any trust, or to any account to be rendered thereof at the suit of the Attorney General or any other person, were overruled—it being decided, that the uses were charitable, and that such fact was sufficiently alleged in the general allegation in the bill—that the revenues were granted for divers public uses and purposes, for the improvement of the city, and the preservation and support of several public buildings, bridges, highways and establishments therein (*a*).

It has been laid down, that the words *ports and havens* in the statute 43 Eliz. c. 4, include such only as tend to the safety of ships of sail, not other vessels, and creeks for harbour, which are employed to find lights to guide ships into the haven, is a charitable use and within those words. An imposition granted upon commodities imported or transported, to be employed upon repair of ports or havens, where they shall land, is a charitable use, and within that statute (*b*). A gift to repair sea banks, where the sea ebbs and flows, is good, notwithstanding others stand bound, by covenant and prescription, to repair them; because it is a common good in preventing a common danger (*c*).

It seems that a parliamentary grant of a duty on coal imported into a town, in aid of the pecuniary inability of the inhabitants to protect the town from the encroachment of the sea, is a gift to a charitable use. It was so considered by Lord *Eldon*, where commissioners appointed by act of Parliament were authorized to levy a rate (not exceeding a certain proportion of the poor-rate) on the occupiers of all houses, shops, warehouses, tenements or hereditaments within the town of Brighton, for paving, lighting, and watching the town; and another rate (not exceeding a fixed sum) on every chaldron of coal landed on the beach, or otherwise brought into the town, for repairing or building works to protect the coast of Brighton against the encroachment of the sea, (the act reciting, that the inhabitants *were unable to raise* money for that purpose without the aid of Parliament,) with power

(*a*) *Gort and Corporation of Limerick* v. *Attorney General*, 6 Dow, 136.

(*b*) Duke, 135, (129); cited by Lord Eldon, 1 Swanst. 308.

(*c*) Duke, 135, (129).

of distress for non-payment, and liberty to apply any surplus of the coal rate, after payment of the debt contracted on the security of that rate, and the expenses of repairs, &c., in aid of the rate for paving, &c. (*d*).

Lord *Eldon*, in subsequently explaining the reasons of his judgment in the last case, stated, that although he was of opinion that the purpose for which the tolls were appropriated was a charitable use, yet it was not necessary that it should be so, to give the Court of Chancery jurisdiction upon the subject. But his judgment proceeded upon the ground, that the Court had jurisdiction to call upon persons intrusted with the application of those tolls, and to direct an account of them to be taken. His lordship added, that the authority

(*d*) *Attorney General* v. *Brown*, 1 Swanst. 265; *S. C.* 1 Wils. C. C. 323. The provisions in the act of Parliament for building or repairing groyns were prefaced by a recital, that the town of Brighton was situate near the sea, within six miles of the harbour of Shoreham, and that great part of the former town having been destroyed by the breaking in of the sea, several groyns (by which is to be understood, buttresses constructed for the purpose of supporting the shore) had some years since been erected, which had preserved the town, and the coast was then safe and commodious for ships to land coal, &c.; and that the groyns were greatly out of repair, and the *inhabitants were not able to raise sufficient to repair the same, without the aid and authority of Parliament*; it was therefore enacted, that the commissioners appointed by the act, or any seven or more of them, should be trustees for repairing the old or building new groyns; and that for effecting the premises, from the 24th of June, 1773, a definite sum should be levied, namely, 6*d.* on every chaldron of coal landed at the town; and a subsequent clause authorized the trustees to give security by assignment of the rate for any sum borrowed, not exceeding 1500*l.* That act continued in force till the year 1810, when another act was passed, by which, after a recital of the insufficiency of the former rate to provide against the inroads of the sea, certain individuals were appointed to repair and maintain the groyns already built, and, if necessary, to build new groyns or works; and were authorized to levy a sum, not exceeding 3*s.*, for every chaldron of coal, &c., landed on the beach, or otherwise brought into the town; and provided, in the same words as in the first act, for the safety and protection of the town, the inhabitants of which had been described as unable to protect themselves against the ravages of the sea.

of the *Attorney General* v. *Brown* was considerably weakened by the opinion given by Sir J. Leach, in the case of *Attorney General* v. *Heelis* (*e*); inasmuch as the reasons on which he proceeded were considerably different from those on which the judgment in the former case was founded (*f*).

In the *Attorney General* v. *Mayor of Dublin* (*g*), it was contended, that the objects of two acts of Parliament for supplying the inhabitants of Dublin with water, were charitable; because their general purpose was, by means of a heavy tax of temporary duration, to discharge a large subsisting debt incurred for that purpose, and to afford a permanent supply of that necessary article of life to all future inhabitants of Dublin, at a comparatively trifling expense; and because no houses were chargeable to the rates directed to be levied, which did not pay to the amount of 5*s*. annually to the minister's money; and because all occupiers of such houses paying the less amount, which were very numerous, would derive benefit from the act without cost, and strictly in the way of charity. Lord Chancellor *Manners* said (*h*), that the question as to charity was a nice point; but that, in order to constitute a charity, it was not necessary, as had been supposed, that the gift should be to the poor, for many of the objects considered charitable were much more beneficial to the rich than the poor—such as repairing and preserving bridges and buildings, &c., which are of indiscriminate benefit. It is the purpose that creates the charity; and although he would not decide absolutely whether the use in question was charitable or not, yet he said, that the defendants would have had great difficulty in sustaining a demurrer to the information.

We have already seen, that gifts "in ease of any poor inhabitants, concerning payments of fifteens, setting out of soldiers, and other taxes," are amongst the charitable uses

(*e*) 2 Sim. & Stu. 76; *ante*, p. 76.

(*f*) 1 Bligh, N. S. 334, 335, 356, 357.

(*g*) 1 Bligh, N. S. 312. It was decided, upon another ground, that the Court of Chancery had jurisdiction.

(*h*) Court of Chancery in Ireland, 22 July, 1824.

enumerated in the statute 43 Eliz. c. 4: but it is said by Sir *F. Moore* (*i*), that "taxes and subsidies are not within that act; because poor men pay them not, and see no ease to discharge them of that tax. But all taxes wherewith the poor as well as the rich are chargeable, are within the intent of that law; as keeping of watches, pursuing of hue and cries, &c., but not fines for escapes for robberies."

In Mr. *Thellusson's* will, there was a residuary gift, in certain events, which have not yet happened, towards payment of the national debt; and therefore no decision has yet taken place with respect to the nature or validity of that gift (*k*).

But in *Newland* v. *Attorney General* (*l*), stock bequeathed to his majesty's government in exoneration of the national debt, was decreed to be transferred to such person or persons as his majesty by his sign manual should think fit to nominate for that purpose; but it does not appear upon what ground.

SECTION II.

Of Uses and Trusts not charitable.

HAVING considered the class of cases deciding what gifts constitute *charitable uses*, we proceed to those donations which, though perhaps bearing a strong resemblance to some of the cases mentioned in the last Section, have, nevertheless, been held *not* to come within the denomination of *charitable uses*.

A general direction by a testator to apply property for "benevolent purposes," or "to such objects of benevolence and liberality as the executor in his own discretion shall most approve of," or in "private charity," or even "for charitable and public uses" in general and undefined terms, with-

(*i*) Duke, 137, (132).
(*k*) *Thellusson* v. *Woodford*, 4 Ves. 227—343; See 2 Sim. & Stu. 596.
(*l*) 3 Mer. 684.

out naming any specific object, have been held not to create charitable uses. Thus, where a testatrix, after giving several legacies to her next of kin and others, some of which she directed to be paid out of the produce of her real estate directed to be sold, bequeathed all her personal estate to the Bishop of *Durham*, his executors, &c., upon trust, to pay her debts and legacies, &c., "and to dispose of the ultimate residue to such objects of benevolence and liberality as the Bishop of *Durham*, in his own discretion, shall most approve of;" and she appointed the bishop her sole executor. It being clear, that liberality and benevolence can find numberless objects not included in the statute 43 Elizabeth, c. 4, in the largest construction of it. As the trusts might be completely executed without bestowing any part of the residue upon purposes strictly charitable, it was held, that the residue could not be said to be given to charitable purposes; and as the trust was too indefinite to authorise an application to any other purpose, it followed, that the residue remained undisposed of, and to be distributed amongst the next of kin of the testatrix (*m*).

And again, where a testator, after giving pecuniary legacies, and one to a charitable institution, gave all the residue of his estate to his executors, upon special trust and confidence, nevertheless, to apply and dispose of the same in or towards such *charitable or public* uses or purposes, person or persons, or otherwise, as he might by any codicil or codicils to his will, or by memorandums in his hand writing, direct or appoint, and as the laws of the land would admit of; and in default of such directions and appointments, then the whole residue, or so much as was not appointed, was to be held upon trust "to pay or apply the same in or towards such charitable or public purposes as the laws of the land would admit of, or to any person or persons, and in such shares and proportions, manner and form, as his executors or the survivor of them, &c., should in their or his discretion think fit, or as they should think would have been agreeable to him, the testator, if living, and as the laws of the land did

(*m*) *Morice* v. *Bishop of Durham*, 9 Ves. 399; *S. C.* 10 Ves. 521.

not prohibit, but admit of;" the testator never having by any codicil or memorandum specified any purpose to which the residue was to be applied, upon a suit by the next of kin, claiming the residue as undisposed of, (the Attorney General insisting that it must be applied to charities, under the direction of the court,) Sir *J. Leach*, V.C., said, "the testator has not fixed upon any part of this property a trust for a charitable use, and I cannot, therefore, devote any part of it to charity; he has given it to the trustees expressly upon trust, and they, therefore, cannot hold it for their own benefit; the necessary consequence is, that the purposes of the trust, being so general and undefined that they cannot be executed by the Court of Chancery, must fail altogether, and the next of kin become entitled to the property" (*n*).

So, where a testator, after the decease of his wife, gave lands to trustees and their heirs upon trust to pay certain legacies, with a power to sell or mortgage, and proceeded thus—"the overplus or reversion of the said messuage, &c., and premises, after my said debts and legacies are so discharged, to be applied by the said trustees and the officiating ministers of the congregation or assembly of the people called Methodists, that now usually, or that shall for the time being, assemble at *Longford*, in *Foleshill* aforesaid, and as they shall *from time to time think fit to apply the same.* To which purpose I will and desire, that when any two or more of my said trustees shall die, the survivors or survivor shall from time to time nominate or appoint others to fill up the number of the said trustees, as herein nominated:" Lord *Ellenborough*, C. J., said, that it was nothing like a devise to charitable uses; for the trustees might apply the estate to any use they thought fit; the will not aiming to confine them to apply it to charitable uses; although it might be supposed that the testator meant them to apply it to superstitious and fanatical uses, yet it was left to their caprice, and unless the court could say that it was a devise to charitable uses, it was not within the statute 9 Geo. II. c. 36 (*o*).

(*n*) *Vezey* v. *Jamson*, 1 Sim. & Stu. 69. See *ante*, p. 59.

(*o*) *Doe* d. *Toone* v. *Copestake*, 6 East, 328; *S. C.* 2 Smith, 495.

Benevolence is distinguishable from charity, for although many charitable institutions are very properly called benevolent, it is impossible to say that every object of a man's benevolence is also an object of charity. Therefore where a will authorises an application to other than strictly charitable purposes, which alone the Court of Chancery has authority to deal with, the trust being too indefinite, cannot be executed by the court.

A bequest of the residue of personal estate, subject to the expenses of executing the will, to three persons whom the testator appointed executors of his will, and to their executors and administrators, "in trust to be by them applied and disposed of, for and to such *benevolent purposes*, as they in their integrity and discretion may unanimously agree on," was held not to amount to a charitable use (*p*).

In order to create a charitable use, the general principle is, that the trust must be of such a tangible nature that the court can deal with it; when it is mixed up with general moral duty, it is not the subject of the jurisdiction of a court of justice. Private charity does not differ from benevolence, and is in its nature indefinite; assisting individuals in distress is private charity, which can neither be controlled nor carried into execution by the crown or the court (*q*). Therefore, where a testator, after bequeathing to A. & B. legacies of stock unequal in amount, and giving several legacies to public charities, requested the said A. & B. to be his executors, and gave to them, as such, 100 guineas each; and then ordered his books, jewels, plate and household furniture to be sold; and after desiring mourning to be provided for his servants, and five guineas each to be given to several persons named in the will and to his two executors, for a ring as a token of remembrance, and concluded his will in the following manner—"In case there is any money remaining, I should wish it to be given in *private charity*;" it was held, that there was no object sufficiently definite to give the crown jurisdiction, or to enable the court to execute the trust, there being no case in which private charity has been made the

(*p*) *James* v. *Allen*, 3 Mer. 17. (*q*) 1 Turn. & Russ. 273.

subject of disposal by the crown, or been acted on by the Court of Chancery; the charities recognized by that court being *public* in their nature, and such as the court can see executed (*r*).

It appears that about the middle of the seventeenth century, though originating probably a good deal earlier, a practice prevailed in the city of *London* of making the chartered companies keep certain stocks of corn in appointed granaries, that the *London* market might be the better supplied; and that in times of scarcity, precepts were issued, enjoining those companies, under pecuniary penalties, to provide such supplies, and sell them at a price fixed by the mayor and common council. An attempt was made to establish as a charity, a gift of a specific sum, out of the rents of an estate, to one of the chartered companies in the city of *London*, "for increase of their stock of corn for the service of the market in *London*;" on the ground, that the increase of the corn brought to market tended to keep down the price, and so to benefit the poor; but the court held—first, that no such effect could be produced on the price, unless a line were drawn, and it were shewn how much the company would have brought to the market but for the gift, and it were ascertained that the gift was so much added to that quantity, a quantity of necessity not only unknown, but which never could be known, inasmuch as there were no *data* for determining it; secondly, that though the gift were admitted to have a tendency, or even the effect of lowering the price, it was no charity in the contemplation of the Court of Chancery; and thirdly, that there was no authority for holding a charitable tendency to be a charitable use; in other words, that a gift to a person for his own benefit, whereby consequential charity might arise, is not a charitable use (*s*).

Where a testator directed that the senior fellow of a college, to which the estate was devised, should live hospitably in the house, entertain the poor, give them cordials, &c. when

(*r*) *Ommanney* v. *Butcher*, Turn. & Russ. 260; see *Legge* v. *Asgill*, *Id.* 265 n., *ante*, p. 59.

(*s*) *Attorney General* v. *The Haberdashers' Company*, 1 Mylne & Keen, 420; *S. C.* 5 Sim. 478.

needful, and moral books, the gift was not considered charitable, not being for collegiate purposes, nor for the good of the college or the public, but to establish somebody to live at the testator's house, and to make his estate unalienable(*t*).

We have already seen, that annuities given to the minister, clerk, and sexton of a parish, to preach a sermon and to keep the testator's tombstone in repair, were held to be charitable uses (*u*); but a gift merely for erecting a monument to the testator's memory, has been held not to be a charitable use.

Thus, where a testator, having devised real estate upon trust to sell, and out of the produce to apply "2000*l.* in erecting a monument to perpetuate the testator's memory in the parish church of St. John, Southwark; 100*l.* to Dr. Johnson, on condition of his writing an epitaph to be inscribed on his said monument; and the sum of 20 guineas to the rector of the parish of St. John, on condition of his consenting to the placing up of the monument," which the testator directed to be set about immediately after his decease, and to be completely finished as soon as possible, not to exceed one year after his decease; Sir *T. Plumer*, M. R., held, that the gift was not a charitable use within the meaning of the statute, and said, that charitable uses are when the donor appropriates a gift, either to charity or to some public purpose, such as the repair of bridges, ports and havens, &c., not operating in any manner to the benefit of himself. But the statute of mortmain does not bear a resemblance to anything like a sumptuary law; and does not apply to property expended, as in the above devise, by the party on himself, for the gratification of his own vanity, on an object which, instead of having any similitude to charity, was the reverse of it; the builder of the monument was to be paid for his labour only. It stood on the same footing as an expensive funeral; and it had never been argued that the expenses of a funeral could not be defrayed out of real estate. There was nothing

(*t*) *Attorney General* v. *Whorwood*, 1 Ves. sen. 534; see 1 Mylne & Keen, 430.

(*u*) *Durour* v. *Motteux*, 1 Ves. sen. 321, *ante*, p. 72.

to control the general right incident to property, of disposing of it, either in the party's lifetime, or after his death, as he may think proper; and though the sum which that testator had devoted to the erection of his monument might be disproportioned to his station in life, the court could not on any such grounds extend the construction of the statute of mortmain (*u*).

A conveyance of lands in fee, upon condition to repair a vault and tomb standing upon part of such lands, and if need be to rebuild it, and to permit the same to be used as a family vault for the grantor and any of *her family* who might desire to be interred therein, is not a charitable use so far as concerns the grantor's own interment, but the trust, so far as it relates to her family, must be considered of that kind (*v*).

SECTION III.

Of Superstitious Uses and Trusts.

1. *Definition of Superstitious Uses.*
2. *Statute of* 1 *Edward VI. c.* 14, *and construction thereof,* p. 93.
3. *Protestant Dissenters,* p. 100.
4. *Jews,* p. 105.
5. *Unitarians,* p. 108.
6. *Roman Catholics,* p. 109.

1. *Definition of superstitious uses.*] A SUPERSTITIOUS use is described to be where any manors, lands, tenements, rents, annuities, profits, hereditaments, goods or chattels, are given, secured, or appointed for and towards the main-

(*u*) *Mellick* v. *The President and Guardians of the Asylum,* Jac. R. 180.

(*v*) *Doe* d. *Thompson* v. *Pitcher,* 3 Maule & S. 407; *S. C.* 2 Marsh. 61; 6 Taunt. 359. See *Gravenor* v. *Hallum,* Ambl. 643; *Durour* v. *Motteux,* 1 Ves. sen. 320; *ante,* p. 72.

tenance of a priest to say mass (*w*), for the maintenance of a priest or other man to pray for the soul of any dead man in such a church or elsewhere, or to maintain perpetual obits, lamps, torches, &c., to be used at certain times to save the souls of men out of purgatory, or to maintain an anniversary or obit, or any light or lamp in any church or chapel, or any like intent (*x*).

Gifts for the following purposes were decided to be superstitious: for the good of the soul (*y*), or for praying for the soul of the testator (*z*), or for the dead, whether in or out of a chapel or church (*a*); for the maintenance of popish priests (*b*); for finding priests (*c*) or obits even for eight years (*d*); for hiring a priest to say mass for the souls of the feoffor and his friends (*e*). So, "to find, support and maintain for evermore a taper of wax of a pound weight, to stand and burn before the image of our Lady in the chancel of a parish church, at all divine service to be done and said within the same church in the honour of our God, our Lady, and all saints," is a superstitious use (*f*).

In a recent case, Lord *Tenterden* seems to have been of opinion, that a trust for supporting a chapel for a congregation of Protestants assembling under the patronage of Lady Huntingdon's College, was a superstitious use within the statute 23 Henry VIII. c. 10 (*g*).

(*w*) It is said, that since the Reformation, a charitable foundation for saying mass, or praying for the souls, &c., is adjudged to be performed by saying the service according to the Liturgy. Co. Litt. 95 b.; 1 Ves. sen. 50.

(*x*) 4 Rep. 104; Bridg. 105; Cro. Jac. 51; *Porter's* case, 1 Rep. 22 b.; Bac. Abr. tit. *Charitable Uses*, &c. (D); Duke, 106.

(*y*) 1 Salk. 162.

(*z*) *Adams* v. *Stakes*, Duke, 89 (466); 4 Rep. 116; *Pele's* case, Duke, 95 (469); 4 Rep. 113.

(*a*) Duke, 107, pl. 10.

(*b*) *Gates* v. *Jones*, cited 2 Vern. 266.

(*c*) *Walpole's* case, Duke, 95 (469); 4 Rep. 113 b.; *Tate's* case, Duke, 94 (468); 4 Rep. 113, 106, b.

(*d*) *Whetstone's* case, Duke, 89 (466); *Colborn* v. *Dale, ibid*; 4 Rep. 116.

(*e*) *Wickham* v. *Wood*, Duke, 93 (473); Lane, 112, 113.

(*f*) *Attorney General* v. *Vivian*, 1 Russ. 226.

(*g*) *Doe* d. *Wellard* v. *Hawthorn*, 2 Barn. & Ald. 96.

A bequest of legacies to several *Roman Catholic* establishments in foreign countries and in this kingdom—*viz.* to each superior for the time being of the *Benedictine Monks* of the south and north provinces (an establishment in this kingdom); to the *English Black Nuns* at *Paris*; to the establishment of the *Benedictine Nuns* at *Cambray*; to the English *Benedictine Monks* of ———, in *Lorraine*; to *J. Bolton*, for the maintenance of a *Roman Catholic* minister for ever—were held to be void; those to the foreign establishments, some of which had ceased to exist, being contrary to the policy of the law; and others, being either given to individuals in characters in respect of which they could not claim, or for an illegal establishment (*g*).

A legacy for such purposes as the superior of a convent, or her successor, should judge most expedient, being given in that character, would, it seems, be deemed a superstitious use (*h*).

It is against the policy of this country to encourage, by the establishment of a charity, the publication of any work which asserts the absolute supremacy of the pope in ecclesiastical matters over the sovereignty of the state; and although the words of the deed are so large, that it may be argued that the purposes of the charity may be effectually carried on in other parts of the world without infringing in any manner on the policy of this kingdom, yet it has been held, that such a trust is a superstitious use, and against public policy.

In a recent case, it appeared that the Bishop of *Blois*, in *France*, and 36 other *Gallican* bishops, had printed and published a certain book, the object of which was to inculcate the belief, that the pope had, in all ecclesiastical matters, a

(*g*) *De Garcin* v. *Lawson*, in Ch. 3 July, 1798, 4 Ves. 433, 2nd ed. n.

(*h*) *Smart* v. *Prujean*, 6 Ves. 567; see 1 Ball & B. 150. The statute for the relief of the Roman Catholics, contains provisions for the suppression or prohibition of religious orders or societies of the church of Rome, bound by monastic or religious vows; see 10 Geo. IV. c. 7, ss. 28—36: but the 37th section of that act excepts any religious order, community or establishment, consisting of females bound by religious or monastic vows. See 2 & 3 Will. IV. c. 115, s. 4.

supremacy which was paramount even to the authority of the temporal sovereign, and was of so sacred a nature, that it was not competent to any sovereign to impair it, or to any pope to alienate it; and that the concordat alienating it, between Pius VII. and the *French* government, was inconsistent with the supremacy, and contrary to the fundamental principles of that church. The plaintiff, being desirous of preserving and perpetuating that book in its original purity, did, while residing in England, transfer the sum of 3786*l.* 10*s.* 4*d.* three per cent. Consolidated Bank Annuities, into the names of himself and the three defendants, upon trusts after the plaintiff's decease, for promoting the circulation of that work (*i*).

(*i*) By an indenture made subsequently to the transfer of the stock, and executed by all the parties, it was declared, that they should stand possessed of the stock upon trust, to permit the plaintiff to receive the dividends for his own use for his life; and after his death, to lay out and apply all or any part of the dividends of the said stock in printing, publishing and circulating in any part of the world, either in the Latin or French language, or in both, as they might think proper, the book so printed and published; and upon further trust, if they the trustees should at any time after the plaintiff's decease, discover or find any university, college or society, in any part of the world, which should profess and entertain the tenets of that book, and be desirous to support the same, and would agree to establish a chair in such university, college or society, to support, maintain and promulgate the said tenets and principles—then that it should be lawful for the trustees, if they should deem it prudent and advisable so to do, to nominate and appoint, in manner therein stated, any number of the members of the said university, college or society, to be trustees for the intents and purposes thereinafter mentioned; and to pay over, transfer and assign the said trust monies unto such trustees, who were to hold the same upon trust, from time to time to apply the dividends of the 3786*l.* 10*s.* 4*d.* three per cent. Consol. Bank Annuities, in printing, publishing and circulating the aforesaid book, in such manner as the said trustees might think most proper for promulgating the tenets of the said book in its original purity according to the spirit of the Catholic church, from its foundation down to the solemn act of the 11th April, 1803, addressed to Pius VII., as aforesaid.

And it was further [illegible] agreed between the [illegible] that if at any time [illegible] several trusts therein [illegible] any of them, [illegible] of law or equity, [illegible] void, or incapable of [illegible] formed or carried into [illegible]

On a bill filed by the party who transferred the stock, praying that if necessary the trusts declared by the deed concerning the said stock might, except as to the trust for the plaintiff during his life, be adjudged to be void, and incapable of being carried into effect; and that the defendants, the trustees, might be decreed to transfer the stock to the plaintiff for his own absolute use. Sir *J. Leach*, M. R., held the charitable trust declared of the stock void, as being contrary to the policy of the law, and observed, "The policy of the court will not permit the execution of a superstitious use; but the court avails itself of the general intention to give the property to charity, although the particular charities chosen by the founder be superstitious; and it effectuates that general intention by devoting the fund to some other charitable purpose. Here there is no general intention to give to charity; and the court, at the same time that it declares that the particular purpose for which the donor has destined the property is a superstitious use which it will not execute, is obliged to state that the gift is altogether conditional. It is a gift to a particular purpose, provided the purpose be lawful; if not, the property is to revert to the donor. On this principle it seems clear that the condition will prevail; and as the particular purpose fails, by reason of its illegality, the party is restored to his original rights. A condition is not unlawful which looks forward to the possibility of a court deciding that the gift is unlawful; if the condition were in itself illegal, the whole deed would be void; here the unlawful gift will not prevail, but the condition will prevail; as the gift was a gift upon condition, the court has no right to inter-

the defendants, or other the trustees for the time being, or the trustees selected from the said university, college or society, if any should have been appointed, should from thenceforth stand possessed of the said sum of 3786*l.* 10*s.* 4*d.* three per cent. Consol. Bank Annuities, and of such part of the dividends arising therefrom as had not been applied in execution of the trusts therein stated, in trust for the executors and administrators of the plaintiff, and to be paid and transferred to them accordingly. See 5 Russ. 289—292.

fere on behalf of the crown. Under these circumstances, the plaintiff is entitled to have the stock re-transferred to him, but he must pay the costs of the suit "(*j*).

2. *Statute of* 1 *Edw. VI. c.* 14, *and construction thereof.*] The statute 23 Henry VIII. c. 10 (*k*), made assurances of lands for churches or chapels, and to certain superstitious uses, void, but did not give any interest to the king; before that act, the finding of an obit and the service of a priest were good uses (*l*). The statute 1 Edward VI. c. 14, s. 5, vests in the crown all lands appointed wholly to superstitious uses, and the sixth section enacts, that where *part* of the revenue of any lands is to be employed in that way, the sums of money destined to such a purpose shall be enjoyed by the king, his heirs and successors (*m*).

(*j*) *De Themmines* v. *De Bonneval*, 5 Russ. 288.

(*k*) *Ante*, p. 19.

(*l*) Cro. Eliz. 449; 4 Rep. 113 a.; 1 Rep. 23 b.

(*m*) The statute of the 1st Edward VI. c. 14, recites—the king's most loving subjects, the lords spiritual and temporal, in this present Parliament assembled, considering that a great part of superstition and errors in Christian religion had been brought into the minds and estimations of men, by reason of the ignorance of their very true state and perfect salvation through the death of Jesus Christ, and by devising and fantasying vain opinions of purgatory and masses satisfactory, to be done for them which were departed; the which doctrine and vain opinion by nothing more is maintained and upholden than by the abuse of trentals, chantries and other provisions made for the continuance of the said blindness and ignorance; and further considering and understanding, that the alteration, change and amendment of the same, and converting to good and godly uses, as in erecting of grammar schools to the education of youth in virtue and godliness, the further augmenting of the Universities, and better provision of the poor and needy, cannot in this present Parliament be provided and conveniently done, nor cannot, nor ought, to any other person committed than to the king's highness, whose majesty with and by the advice of his highness's most prudent council, can and will most wisely and beneficially, both for the honour of God, and the weal of this his majesty's realm, order, alter, convert and dispose the same.

By the 2nd section, all colleges, free chapels and chantries existing within five years preceding that Parliament, and not in the actual possession of the late or present

The statute of Edward VI. was taken to extend only to such uses as tended to superstition, which may be collected

king (except such as should be altered by the king's commissioners), and all lands and hereditaments thereto belonging or given for the finding of a priest, were declared to be in the actual seisin and possession of the present king, without any office found.

By the 3rd & 4th sections, all lands, &c. given to priests for years, were vested in the king for the remainder of such term of years, but on the expiration of such term, reversioners might enter without suing livery.

By the 5th & 6th sections it is enacted, that the king, his heirs and successors, should have and enjoy for ever, all lands and other hereditaments, which by any assurance, will, devise or otherwise, at any time theretofore made or declared, were given or appointed, or to be employed wholly to the finding or maintenance of any anniversary or obit, or other like thing, intent or purpose, or of any light or lamp, in any church or chapel, to have continuance for ever, which had been kept or maintained within five years next before that Parliament. And also, that where but part of the issues or revenues of any manors, lands or other hereditaments, had by any of the ways or means above said been given, assigned or appointed to be bestowed, or employed to the finding or maintenance of any anniversary or obit, or other like thing, intent or purpose, or of any light or lamp in any church or chapel, to have continuance for ever; that then the king should for ever have and enjoy every such sums of money, that in any one year within the five years next before that Parliament had been expended and bestowed about the finding or maintenance of any such anniversary or obit, or other like thing, intent or purpose, of any light or lamp, to him, his heirs and successors for ever, as a rent charge to be paid yearly, with power of distress and entry for default of payment.

By the 7th section, all brotherhoods or guilds, and their possessions, except companies of trade, were vested in the king.

By the 8th section, commissioners were to be appointed under the great seal; with power to survey all lay corporations, and to inquire of the revenues applicable to priests, obits, &c., and of lands, &c., vested in the king by that act; and to assign lands applicable to grammar schools; and to appoint and endow vicars; and to assign lands for maintenance of additional priests in any parish; to make rules for priests and schoolmasters; and to assign yearly pensions for life, to deans, priests or poor persons dependent on dissolved colleges, &c.; and to inquire of perpetual allowances to poor people, and to make assignments for payment thereof; and also to appoint lands for piers, sea banks, &c.

It was declared by the 15th section of the act, that it should not

from the words of the act, and inferred from the time when it was made—the policy of those days being to subvert the authority of the pope, and to dissolve the abbeys, chantries, and similar establishments (*n*).

Parsonages and vicarages, although within the words of the statute 1 Edward VI. c. 14, were not within its intent, and were excepted by an equitable construction (*o*); and although the act in terms embraced all manner of colleges, yet it applied only to those that were superstitious, and not to the colleges of the universities (*p*), and it did not extend to any hospital whatsoever, either lay or religious (*q*). The statute also related only to such superstitious uses mentioned in it as were then existing, and was not prospective (*r*).

Where a charitable use was intermixed with the superstitious, so that they could be distinguished, the king was entitled to so much only as was given for the latter purpose (*s*).

The following distinctions were established in the construction of this statute (*t*): first, if land of the yearly value

extend to the colleges in Cambridge, Oxford, St. George's Chapel, Windsor, nor to Winchester and Eton, nor to parochial chapels of ease, nor to any cathedrals, or their lands, except chantries there existing, within five years.

It is said that the chantries and free chapels sold for a considerable sum, and that a great number of grammar schools were founded, chiefly out of the chantry lands. It is observed by Eden, that the rapacity of the courtiers rendered it impracticable to carry the ostensible objects of this statute into effect. Hist. of the Poor, vol. i. 95, 96. See Andrews's Contin. of Henry's Hist. of Great Britain, vol. i. 365.

(*n*) *Gibbons* v. *Maltyard*, Poph. 8; See *Porter's* case, 1 Rep. 23 b.

(*o*) Plowd. 466; Palm. 125; Hardr. 208.

(*p*) Hob. 122.

(*q*) Co. Litt. 342 a.

(*r*) *Rex* v. *Portington*, 3 Salk. 334; *S. C.* 12 Mod. 31; *Porter's* case, 1 Rep. 23 b.; *Cary* v. *Abbott*, 7 Ves. 495.

(*s*) Duke, 105.

(*t*) It may perhaps appear almost superfluous in the present day, to enter upon the construction of this statute; questions, however, may now arise upon it, when old grants to charitable uses become the subject of judicial consideration, as in the late case of *Attorney General* v. *Vivian*, 1 Russ. 226. The principle of these decisions, making the illegal purpose paramount where the superstitious uses and the lawful uses were so inseparably blended that one could not be distinguished

of 20*l.* was given for the finding of a priest, and a salary of 10*l.* appointed to him, the king was entitled to the whole land, as the residue shall be intended to be for the finding of necessaries for the priest; if a condition was annexed to the gift to pay 10*l.* *per annum* to the priest, then the king was entitled to that sum only (*u*). That if land of the yearly value of 20*l.* was given to find a priest to pray for souls, who was to have an annual salary of 10*l.*, and the rest was given to the poor, as the latter was distinct from the superstitious use, the king was entitled only to the 10*l.* given to the priest, and not to the whole land; but it was otherwise where the land was given generally for finding a priest and for the maintenance of the poor, without saying how much the priest was to have (*v*). When a certain sum was given to a priest, and divers other good uses were limited, if they depended upon the superstitious use, the king took all: where all the uses were superstitious, however certain, the land was given to the king (*u*).

An hospital, founded and endowed under a license granted by King Richard II. with lands, for certain poor persons to serve God, and especially to pray for the soul of King Richard and the founder while they lived and after, and for the souls of the king's progenitors and heirs, and his own ancestors and heirs for ever, according to such ordinances as he should make, one of which was, that the poor should every day go to mass to a chapel of friars near adjoining, and should say fifty paternosters and as many avemarias, was held to be a superstitious hospital, and to be given to the crown by the statute 1 Edward VI. c. 14, although the word hospital was not in that act (*v*).

Where lands were devised to the Company of Goldsmiths, to the intent that they with the issues and profits should repair the tenements, and pay all rents issuing thereout; and

from the other, is followed in modern decisions, in gifts of personal estate connected with land.

(*u*) Duke, 107.

(*v*) *Ibid.*

(*u*) *Ibid; Adams and Lambert's* case, 4 Rep. 104 b.; *S. C.* Moor, 648.

(*v*) *Pits* v. *Webster*, Palm. 124; *S. C.* Hob. 121.

should keep an obit, and should spend at it yearly 33*s.* 4*d.*, and find perpetually a priest to sing mass for his soul; who should also keep a grammar school, chiefly for the poor, and receive 10*l.* yearly for his salary; and the value of the tenements at the time of the gift exceeded the superstitious uses 50*l. per annum*; it was decided, that all the tenements were given to the king by the said act, for although the direction to found a grammar school chiefly for the relief of the poor was a good and charitable use, yet being mixed with a superstitious use, and nothing in certain limited to the good use, in such case the uncertain mixture of the bad use with the good one infected the whole (*w*); and that the good use being derived out of the superstitious use, and to be performed by the priest, could not save the land, and it was the same as if the whole had been limited to the superstitious uses (*x*). So where a testator devised lands to the Dean of Newark for an *obit*, and the residue to pay a chantry priest 7*l. per annum* during the lives of his wife, and another to chaunt for his soul, and afterwards to perform divine service for 99 years, and then directed the lands to be sold and the produce distributed to charitable uses for the *aforesaid souls*, and the feoffees conveyed for 99 years, reserving 7*l.* to the priest; and then came the statute of 1 Edward VI. c. 14, it was held, that the fee simple of the land was forfeited, as the testator had turned all to superstitious uses (*y*).

But where land was given to maintain a *charitable use* for the relief of the poor, and also that the schoolmaster or poor should pray for the donor's soul, the charitable use being considered as the principal intent of the donor, and the *superstitious* use of praying for the soul, but an accessary, the charitable use preserved the lands from forfeiture (*z*). It was the same where a certain sum was given

(*w*) See Plowd. 51 a.

(*x*) Sir *Bartholomew Read's* case, Moor, 654; 4 Rep. 113 a.

(*y*) *Waldern* v. *Ward*, 2 Sid. 13, 34, 46; *S. C.* 3 Salk. 335. See Hob. 122, 123.

(*z*) *Hynshaw* v. *Corporation of Morpeth*, Duke, 69 (242).

out of lands for maintaining a priest to say mass, and the remainder for repairing a church (*a*).

Lands given by a tenant in tail to superstitious uses, and enjoyed accordingly, five years before the statute 1 Edward VI., belonged to the crown, for the issue was excluded by the saving in the statute (*b*). The king did not under this statute acquire the freehold of copyhold lands given to superstitious uses, but it remained in the lord of the manor, the uses being void, and the copyhold tenure destroyed (*c*).

Where there is an absolute devise, an averment, that it was for a superstitious use, is excluded by the statute of frauds (*d*), and the nature of the thing; but an information may be maintained at the suit of the crown for a discovery of the superstitious use, as the statute of frauds did not affect the king, who is bound by law to see that nothing be done to the propagation of a false religion (*e*).

The superstitious intent of the donor was in some early cases presumed from his own religious opinions: thus where a recusant conveyed land by a fine in trust, that the profits should be employed upon an hospital of *religious*, which should be renewed when the times would serve, and in the mean time, the profits were to be employed in the relief of poor people at the discretion of the trustee and his heirs, according to the intent of the donor: because it was apparent that the donor was a recusant, and the employment was to be according to his intent, which could only be for the relief of poor recusants, which was contrary to law; it was decided not to be a charitable use (*g*). So where lands were conveyed to trustees upon hope that they would employ the profits thereof to the use of the poor scholars in Oxford or Cambridge, or elsewhere, being such as studied

(*a*) Duke, 108, pl. 14; Cro. Eliz. 180.

(*b*) *Lord Sheffield & Ratcliff's* case, Godb. 309.

(*c*) *Bagnall & Pot's* case, Godb. 233. See 1 Edward VI. c. 14, s. 39, 40.

(*d*) 29 Charles II. c. 3.

(*e*) *Rex* v. *Lady Portington*, 1 Salk. 162; 3 Salk, 334.

(*g*) *Lady Egerton's* case, Duke, 133 (127).

divinity and took holy orders, according to the discretion of the trustees, and agreeable to the intent of the donor; because he was a *recusant*, it was inferred, that his intent was in favour of poor popish priests, the words elsewhere meaning in some foreign university, and holy orders such as were popish, and therefore the land was decreed to the heir, because the use was not charitable but superstitious (*h*).

Although the statute 1 Edward VI. c. 14, was not prospective so as to vest in the crown property afterwards given to superstitious uses, but related only to such as were then existing; and although there is no statute making superstitious uses void generally, except such as are within the statute 23 Henry VIII. c. 10, yet it has been determined, where property is devoted to superstitious uses which are in their nature charitable, that the crown has the power of applying it to some other charitable purpose. When a devise is to a superstitious use, and made void by statute, or to a charity void by the statute 9 Geo. II. c. 36, the land or fund will belong to the heir at law, or next of kin; but where it is in itself a charity, but the mode in which it is to be applied cannot by the law of England take effect, as for promoting a religion contrary to that established by law; then the crown by sign manual, directed to the Attorney General, may give orders to what charitable purpose it shall be applied (*i*). Thus in *Cary* v. *Abbot* (*j*), the testator gave the residue of his personal estate to his executors, and directed them to apply the interest "for the purpose of educating and bringing up poor children in the *Roman Catholic faith*, such as orphans, or those whose parents and friends were not able or willing so to educate those children: to be chosen by my trustees hereinafter named, or such trustees as they shall afterwards appoint or cause to be appointed; nevertheless, I at all times allow a part of this residue, to pay such sum or sums as may be requisite for the

(*h*) Duke, 134, 135 (128).

(*i*) *De Costa* v. *De Paz*, Ambl. 228. *S. C.* 1 Dick. 258; *Attorney General* v. *Berryman*, Dick. 168; *De Garcin* v. *Lawson*, 4 Ves. 433, 2nd ed. See 7 Ves. 77; 1 Mer. 100.

(*j*) 7 Ves. 490.

legal security or execution of this or any other part of my will." On a bill by the testator's next of kin, claiming the residue as in case of an intestacy, the use being for orphan children, and clearly charitable in its nature, although vitiated by being for educating them in the Roman Catholic religion; the court declared the bequest of the residue void, but directed it to be applied to such use as the king should appoint by sign manual. The same direction was given where money was directed to be applied in teaching the Jewish law (*k*). So one moiety of a legacy given to a Jewish charity, which was not permitted to take effect, was paid pursuant to the king's sign manual to the Magdalen Hospital, and the other moiety to the London Infirmary (*l*).

3. *Protestant Dissenters.*] The Court of Chancery will not take notice of religious opinions with a view to decide whether they are right or wrong, but it will notice them as facts pointing out the ownership of property. That court will support establishments of Protestant Dissenters according to their institution, if the doctrine preached in them be tolerated by law (*m*). It is familiar to every one acquainted with our history, that so early as the reign of Richard II., and in a few instances before, attacks had been made on the papal power in this country, which ended in its total abolition in the reign of Henry VIII. The short life of his successor was almost wholly occupied with his favourite scheme of reformation. One of his statutes against the superstitious errors of the Roman Catholic religion has been already considered, and laws were passed to fix the doctrines and settle the polity of the new church in a body of articles. The forms of divine worship and administration of the sacraments were then first set forth in the book of Common

(*k*) *De Costa* v. *De Paz*, Ambl. 228; *S. C.* 2 Swanst. 487; *De Garcin* v. *Lawson*, 4 Ves. 433, 2nd ed. 1 Mer. 100.

(*l*) *Isaac* v. *Gompertz*, 23 July, 1792, Dick. by Wyatt, 169 n.; *S. C.* 7 Ves. 61; Ambl. 228 n. by Blunt.

(*m*) See Beldam's Summary of Laws affecting Protestant Dissenters, 4 Bl. Comm. 50—54; Burn's Justice by Chitty, and Eccl. Law, tit. *Dissenters*.

Prayer, and established by the Act of Uniformity (*n*), and every other mode of worship was prohibited under severe penalties. Other ecclesiastical regulations of minor importance followed, and some alterations and additions were made to the Prayer Book, particularly in the forms of consecration (*o*). In the reign of Queen Mary, the papal authority and faith were restored to their former state, and such divine service and administration of sacraments as were commonly used in the last year of Henry VIII. revived (*p*). On the accession of Elizabeth, the national religion again underwent a change; the statutes of Mary were repealed, and those of Edward revived (*q*); and another Act of Uniformity was passed (*r*). From the articles framed and published by him, were selected and compiled the thirty-nine which comprise the doctrine and polity of the present church. The book of Common Prayer received additional alterations (*s*). The usurped power of the pope in this kingdom was destroyed, and all his connections with it cut off, and the crown again restored to its supremacy over spiritual men and causes, and the patronage of bishopricks indisputably vested in the crown (*t*). By a convocation of bishops and divines held in pursuance of the king's commission in the reign of Charles II., the book of Common Prayer was reviewed, and some alterations and additions were made to it, and uniformity to it was enforced by another statute (*u*); since that time, no alterations have been made in the constitution of the established church.

By stat. 1 Will. & Mary, c. 18, s. 8 (*v*), called the Tolera-

(*n*) 2 & 3 Edward VI. c. 1.

(*o*) 5 & 6 Edward VI. c. 1, 3 & 4 Edward VI. c 10, 2 & 3 Edward VI. c. 21.

(*p*) 1 Mary, sess. 2, c. 2.

(*q*) 1 Eliz. c. 1.

(*r*) 1 Eliz. c. 2.

(*s*) 1 Eliz. c. 2.

(*t*) 1 Eliz. c. 1, ss. 16, 27—31, 34—37; 5 Eliz. c. 1, ss. 1, 2, 3, 4, 10.

The king's supremacy over ecclesiastical persons and things, is traced from an early period, in the introduction to the fifth part of Coke's Reports. See 4 Inst. 42, 331, 341.

(*u*) 13 & 14 Charles II. c. 4.

(*v*) Confirmed and extended by 10 Anne, c. 2, 19 George III. c. 44, 52 Geo. III. c. 155; see 9 Geo. IV. c. 17, substituting a declaration in lieu

tion Act, Protestant dissenting ministers subscribing the declaration, and taking the oaths required by that act, and subscribing the articles of the Church of England, except the 34th, 35th, 36th and part of the 20th article, were exempted from the penalties of several former statutes (*w*). Quakers also who make the declarations and profession of faith required by the act (*x*), are exempted from certain penalties mentioned in the act, and declared to be entitled to the same benefits, privileges and advantages as any other dissenters under the act.

By the 17th section of the Toleration Act it was declared, that nothing therein contained should extend to give any ease, benefit or advantage, to any *papist* or popish recusant whatsoever, or any person that should deny in his preaching or writing the doctrine of the Blessed Trinity, as it is declared in the articles of the Church of England.

By 19 George III. c. 44, s. 2, it was enacted, that no Protestant Dissenter, taking certain oaths and subscribing a declaration against Popery, should be prosecuted for teaching and instructing youth as a tutor or schoolmaster; but by the third section of that act it is provided, that it shall not enable any person dissenting from the Church of England, to hold the mastership of any college or school of royal foundation, or of any other endowed college or school for the education of youth, unless the same should have been founded since the first year of King William and Queen Mary for the immediate use and benefit of Protestant Dissenters.

The 9th & 10th Will. III. c. 32, enacted, that if any person educated in or having made profession of the Christian religion, should by writing, printing, teaching or advised speaking, deny any of the persons in the Holy Trinity to be God, or assert that there are more Gods than one, or deny the Christian religion to be true, or the Holy Scriptures to be of Divine authority; he should upon the first offence be ren-

of the sacramental test, as a qualification for certain offices.

(*w*) 17 Charles II. c. 2, 13 & 14 Charles II. c. 4, and the 22nd Charles II. c. 1.

(*x*) Since altered by 8 George I. c. 6.

dered incapable to hold any office or place of trust, and for the second be rendered incapable of bringing any action, being guardian or executor, and of taking any legacy or deed of gift, and should suffer three years' imprisonment without bail (*y*). A person offending under this statute may be also indicted at common law (*z*). On a motion in arrest of judgment after conviction for a blasphemous libel, on the ground that this statute had put an end to the common law offence, the court decided that it had not, considering that the provisions of the statute were cumulative (*a*).

By 53 George III. c. 160, so much of the 1st Will. & Mary, sess. 1, c. 18, s. 17, and of the 9th & 10th Will. III. c. 32, as relates to persons denying the Trinity, is repealed. The statute 53 George III. c. 160, s. 2, does not alter the common law, but only removes the penalties imposed upon persons denying the Trinity by stat. 9 & 10 Will. III. c. 32; and, therefore, a publication containing contumelious remarks on the character of Jesus Christ—as that he was an impostor, a murderer in principle, and a fanatic, published with the intent to impugn the authenticity of the Scriptures, still an offence at common law (*b*).

Since the Toleration Act, trusts for the benefit of Protestant dissenting ministers have been held valid. Thus the

(*y*) But the delinquent on publicly renouncing his error in open court, within four months after his conviction for the first offence, is to be discharged.

(*z*) *Rex* v. *Woolston*, Barnard. 162; Fitzgib. 64, *Rex* v. *Williams*, 1797; 26 How. St. Tr. 654.

(*a*) *Rex* v. *Carlile*, 3 Barn. & Ald. 161; see Burr. 799.

(*b*) *Rex* v. *Waddington*, 1 Barn. & Cr. 26. In this case, Bayley, J., said, the statute 53 George III. c. 160, removes the penalties imposed by certain statutes referred to in the act, and leaves the common law as it stood before: and Best, J., said, that act had made no alteration in the common law relative to libel; if previous to the passing of that statute it would have been a libel to deny in any printed work, the divinity of the second person in the Trinity, the same publication would be a libel now; and, that the Legislature in passing the Toleration Act, only thought of easing the consciences of Dissenters, and not of allowing them to attempt to weaken the faith of the members of the church.—See 2 Starkie on Libel, 151, 2nd ed.; 1 Russ. on Crimes, 217—220, 2nd ed.

bequest of a residue of the testator's estate and effects, "for encouraging such non-conforming ministers as preached God's word in places where the people were not able to allow them a sufficient and suitable maintenance, and for the encouraging such as were designed to labour in God's vineyard among the Dissenters," was held not to be a superstitious use within the statute 1 Edward VI. c. 14, but a gift to Dissenters within the Toleration Act (*d*), to be distributed immediately, and not made a perpetual charity (*e*). It is now clearly settled, that if a fund, real or personal, be given in such a way that the purpose be clearly expressed to be that of maintaining a society of Protestant Dissenters, promoting no doctrines contrary to law, although such as may be at variance with the doctrines of the established religion, it is then the duty of the court to carry such a trust into execution, and to administer it according to the intent of the founders (*f*).

Thus, where testator directed his trustees to stand possessed of money "in trust for the augmentation of the charitable collections which should be thereafter made for the benefit of the poor dissenting ministers of the gospel, residing and living in any of the counties of England, to be paid to the treasurer or treasurers of such charitable societies or fund for the time being, for that purpose, as the major part of them should direct or appoint:" it was stated in the answer, which was supported by evidence, "that the Protestant Dissenters in this kingdom were distinguished by the several denominations of *Presbyterians*, *Independents*, and *Baptists*; and that the Dissenters of each of those denominations, living and residing in and near London and Westminster, had a separate society, consisting of persons chosen out of their respective congregations, which society was called by the name of the managers of the fund for the sup-

(*d*) 1 Will. & Mary, c. 18, *ante*, p. 101.

(*e*) *Attorney General* v. *Hickman*, Kelynge, R. 34: *S. C.* 2 Eq. Cas. Abr. 193, pl. 14.

(*f*) *Per* Lord Eldon, *Attorney General* v. *Pearson*, 3 Mer. 409, 410; *Attorney General* v. *Cock*, 2 Ves. sen. 273.

port of the poor dissenting ministers of that denomination in the country; and that there were charitable collections annually made at the said meeting houses, belonging to most of the several congregations belonging to each of the denominations, in and about the cities of London and Westminster; and the money given at such collections was constantly and regularly carried to the said fund, and paid into the hands of the treasurer thereof for the time being; and that the same was disposed of by the said managers of such funds, for and towards the support of poor dissenting ministers in the country, whose annual subscriptions from their own congregations were so small, as not to be sufficient, in many cases, to support themselves and families with the common necessaries of life; and also for the relief of any extraordinary necessitous cases of such poor ministers and their families as might occasionally occur: and they had each a treasurer, who took minutes of their proceedings at their several meetings, which were fairly entered in books kept for that purpose, as also the accounts of the disposition of the said charity." It was objected, that the bequest was void, on account of uncertainty in the description of the objects; but the court held, that the bequest was good, being intended for the ministry in general, and ordered the money to be paid to all the treasurers of the three denominations upon the trusts declared (*g*).

4. *Jews.*] The Christian religion being considered as part of the law of the land, a trust or bequest hostile to that mode of faith is illegal (*h*).

Thus, where a testator directed his executors to invest a sum of 1200*l.* in some government or other security; and directed that the revenue arising therefrom should be applied for ever in the maintenance of a *Jesiba*, or assembly for daily reading the Jewish law, and for advancing and propagating their holy religion; and directed that his executors

(*g*) *Waller* v. *Childs*, Ambl. 524.

(*h*) *Taylor's* case, 1 Ventr. 293, 3 Keb. 607, 621; *Woolston's* case, Fitzg. 64, 2 Str. 834; *Villareal* v. *Mellish*, 2 Swanst. 539; *In re Bedford Charity*, 2 Swanst. 470.

during their respective lives, should have the management of the assembly. On a bill to have the sum laid out according to the directions of the will, Lord *Hardwicke* distinguished this case from that of a bequest for the support of poor persons of the Jewish religion, as to which orders were made every year by the court. The bequest in question was for the propagation of the Jewish religion; and though it is said that this is part of our religion, yet the intent of the bequest must be taken to be in contradiction to the Christian religion, which is undoubtedly, as laid down by Lord Hale, and Lord Raymond (*i*), part of the law of the land, for the constitution and policy of this nation is founded thereon. As to the Act of Toleration (*j*), no new right is given by that, but only an exemption from the penal laws. The Toleration Act recites the penal laws, and then not only exempts from those penal laws, but puts the religion of the Dissenters under certain regulations and tests; this renders those religions legal (*k*), which is not the case of the Jewish religion, that is not taken notice of by any law (*l*), but is barely connived at by the Legislature (*m*). His lordship, therefore, declared that the legacy was not good in law, and ought not to be established by the court (*n*).

(*i*) *Taylor's* case, 1 Ventr. 293, 3 Keb. 607, 621; *Woolston's* case, Fitzg. 64, 2 Str. 834.

(*j*) 1 Will. & Mary, c. 18.

(*k*) See *Harrison* v. *Evans*, 2 Burn's Eccl. Law, 207, 220; *Furneaux'* Letters to *Blackstone*, App.; *Rex* v. *Barker*, 3 Burr. 1265, 1 Bl. R. 300, 352; *Attorney General* v. *Pearson*, 3 Mer. 353.

(*l*) See 10 George I. c. 4.

(*m*) It has been contended, that the statute 53 George III. c. 160, has extended to the Jews the exemptions conferred by the Toleration Act, which afforded, it is said, relief to all persons not members of the church, except such as did not believe in the doctrine of the Trinity, and as that exception has been repealed, that the law so altered includes the Jews. On the other hand it is insisted, that the Toleration Act, as extended by the 53rd George III. c. 160, does not afford relief to the Jews, because the former act was intended for the relief of *Protestant Dissenters* only, and, therefore, that Jews cannot come within its operation.—See Goldsmid's Remarks on the Civil Disabilities of the Jews, 62—68. Blunt on the Civil Disabilities of the Jews, 111—117.

(*n*) *De Costa* v. *De Paz*, 2 Swanst. 487—491, Ambl. 228, 1 Dick. 258, 2 Ves. sen. 274—276.

It has also been decided, that a bequest to maintain a synagogue, in which Jews met daily to say prayers and sing psalms in the Hebrew language (although not for otherwise propagating their religion) was illegal (*o*). In an action by lessees for the rents of seats in a Jewish synagogue, it was objected that by the law of England such an establishment was not tolerated; but Lord *Tenterden* held, since no authority could be produced to the contrary, that such establishments were lawful (*p*).

Although a donation for founding an institution for teaching the Jewish religion is illegal, yet Jews may be objects of charitable trusts.

Thus an annuity of 20*l.* to be given away every New Year's Day among poor Jews, and an annuity of 30*l.* for teaching and instructing ten poor Jews' children in London, were supported. In the same case, an annuity of 40*l.* given to the *gabas* of a synagogue in London, was established, the Master having certified that the *gabas* are persons annually chosen by those frequenting the synagogue as treasurers of it; whose duty it was to collect the annual subscriptions for the support of the poor Jews belonging to the synagogue, and to apply the money received by them in payment of the expenses of the synagogue, and in the maintenance of poor Jews and their families, that they might not become a burthen to the parish in which they reside. The parties were directed to lay a scheme before the Master for the expenditure of the annuity (*q*). So also Lord *Eldon* is understood to have been of opinion, that Jews were entitled to vote at the election of a vicar, to be chosen by the inhabitants of a parish, although Roman Catholics had no such right (*r*).

It was decided that Jews are not objects of the Bedford Grammar School, founded by a charter of Edward VI. for instruction in grammar, literature and good manners—one

(*o*) *Isaac* v. *Gompertz*, Ambl. 228, 2nd ed., n. by Blunt.

(*p*) *Israel* v. *Simmons*, 2 Stark. N. P. C. 356.

(*q*) *Isaac* v. *Gompertz*, Ambl. 228, 2nd ed., n. by Blunt; *De Costa* v. *De Paz*, 2 Swanst. 487, *ante*, p. 106.

(*r*) *Edenborough* v. *Archbishop of Canterbury*, 2 Russ. 111 n.

object of the institution being education in the Christian religion, which was incompatible with the admission of Jews (*r*).

5. *Unitarians.*] It was contended in *Attorney* v. *Pearson* (*s*), that the court could no more carry into effect a trust for promoting Unitarianism, than it could a trust for the preaching of Judaism; and that the one purpose was not more contrary to law, and incapable, on that ground, of being supported in a court of justice, than the other. It was not neeessary, however, in that case to decide the question, although Lord *Eldon* said, that it was not intended by some recent acts (*t*) of the Legislature (in one House of Parliament at least) to alter or in any manner affect the common law—his lordship (as a judge in equity) not presuming to say what was the doctrine of the common law in question, nor what effect, intended or not intended by the Legislature, the late acts might have upon it; but if the common law remained unaltered, and if the impugning the doctrine of the Trinity were an offence indictable by the common law, it was quite certain that he ought not to execute a trust, the object of which was illegal (*u*).

The writer is not aware of any case in which this point has been expressly determined, although persons professing Unitarian doctrines have been held not to be objects of particular charities (*v*); those cases, however, do not appear to have proceeded on the ground of the *illegality* of a trust for such persons, but upon the ground that they were not objects within the contemplation of the particular donors, or the terms of the instruments of endowment. A bequest for the benefit of Unitarians having no reference to the propagation of their peculiar tenets, would be valid, upon the same principle as a similar one for Jews (*w*).

(*r*) *In re Bedford Charity*, 2 Swanst. 470.

(*s*) 3 Mer. 393, Sir S. Romilly *arguendo*.

(*t*) 53 Geo. III. c. 160; Ireland, 57 Geo. III. c. 70; *ante*, pp. 102, 103.

(*u*) 3 Mer. 399; see *ante*, pp. 103, 105.

(*v*) *Attorney General* v. *Shore and others*, V.C., 23rd Dec. 1833; Reg. lib. (A), 1833, fol. 372; *Attorney General* v. *Pearson*, V. C., 6th Mar. 1835.

(*w*) See *ante*, p. 107.

6. *Roman Catholics.*] An important alteration has been made in the law respecting the Roman Catholics by some recent statutes (*x*). The full extent of their operation, in rendering valid purposes which before were deemed superstitious and against the policy of the law, remains to be settled by the construction, which may be put upon these acts. It would be foreign to the object of this work to enter upon the various enactments (*y*) which have from time to time been made against persons professing the Roman Catholic religion. The subject is only adverted to for the purpose of better explaining the recent acts which have been passed for their relief. We have already seen that Roman Catholics were excepted in the Toleration Act (*z*). By stat. 11th and 12th Will. III. c. 4, if any Papist, or person professing the Popish religion kept a school, or took upon himself the education, or government, or boarding of youth, he was liable to perpetual imprisonment; but by stat. 31st Geo. III. c. 32, s. 13, a Roman Catholic taking and subscribing the oath and declaration prescribed by that act, was exempted from prosecution for teaching and instructing youth; but by the three following sections it was declared that no Roman Catholic should hold the mastership of any college or school of royal foundation, or of any other endowed college or school for the education of youth; nor receive into his school for education the child of any Protestant father, nor keep a school until his name, &c. should have been recorded by the clerk of the peace.

By the 17th section of the latter act, it was provided that nothing contained in it should make "it lawful to found, endow, or establish any religious order or society of persons bound by monastic or religious vows; or to found, endow, or establish any school, academy, or college, by persons professing the Roman Catholic religion within these realms, or the dominions thereunto belonging; and that all uses, trusts, and dispositions whether of real or personal property, which immediately be-

(*x*) 10 Geo. IV. c. 7; 2 and 3 Will. IV. c. 115.

(*y*) See summary of these laws, Butl. Co. Littl. 391 a. n.; 4 Bl. Comm. 54—59.

(*z*) *Ante*, p. 102.

fore the 24th day of June, 1791, should be deemed to be *superstitious* or *unlawful*, should continue to be so deemed and taken."

Both before and after this act, a disposition for the purpose of bringing up and educating children in the Roman Catholic religion in England was clearly unlawful, and would not be carried into effect by a court of equity (*a*).

It seems, that by the law of Ireland, the endowment of Catholic schools was illegal as well as in England (*b*).

A bequest to persons called Roman Catholic bishops and their successors was held void in Ireland, no such characters being known to the law of that country; but where they were named individually, though described as Roman Catholic bishops, a bequest to them as trustees was considered good for their joint lives, subject to the control of the Court of Chancery (*c*).

Under a devise of freeholds in Ireland to the Catholic bishop of C. in Ireland, and the parish priest of M. and the natural lives of their successors, upon certain trusts, for establishing a foundling hospital in Monaghan or Dublin, it was held that upon the death of the *survivor* of the then bishop and priest, the heir-at-law of the testator was entitled to

(*a*) *Cary* v. *Abbot*, 7 Ves. 490; *ante*, p. 99.

(*b*) *Attorney General* v. *Power*, 1 Ball & B. 145.

By Irish stat. 7 Wm. III. c. 4, s. 9, Papists were prohibited from keeping school under a penalty of 20*l.* and three months' imprisonment. By Irish stat. 8 Anne, c. 3, s. 16, the same penalty was extended to Roman Catholics becoming ushers in Protestant schools. By Irish stat. 21 & 22 Geo. III. c. 62, which repealed the above acts, it is provided, that nothing contained therein should allow the erection or endowment of any Popish university, or college, or endowed school in Ireland. By Irish stat. 32 Geo. III. c. 21, s. 15, the license from the ordinary required by the 21 & 22 Geo. III. c. 62, was dispensed with; the Irish act, 35 Geo. III. c. 21, establishing the College of *Maynooth*, contains a legislative declaration as to the law upon the subject in these words, "whereas by the laws now in force in this kingdom, it is not lawful to endow any college or seminary for the education, exclusively of persons professing the Roman Catholic religion, and it is now become expedient, that a seminary should be established for that purpose." See *Attorney General* v. *Power*, 1 Ball & B. 150—153.

(*c*) *Attorney General* v. *Power*, 1 Ball & B. 145.

recover, as no estate, passed for the natural lives of the successors, either to the then bishop and priest, or their representatives, or to the successors (*c*).

In a case where a sum of money was bequeathed upon trust, to apply the interest in clothing such poor children as should be educated in the school of the nunnery in Waterford, Lord Chancellor *Manners*, although he said that it might be presumed that the bequest was for an endowment of a Roman Catholic school, which by the law of England would be deemed invalid, either as contrary to the statute 1 Edward VI. c. 14, or as being against public policy, would not act on that presumption, but referred it to the Master, to inquire and report as to the character and description of the school (*d*).

By the statute 10 Geo. IV. c. 7, ss. 10, 12, Roman Catholic subjects may hold and enjoy all civil and military offices and places of trust under the crown, and exercise any other franchise or civil right, except the office of guardians, or justices, or regent of the United Kingdom, or of lord chancellor, lord keeper or lord commissioner of the great seal, or office of lord lieutenant, or other chief governor of Ireland, or high commissioner of the General Assembly of the Church of Scotland. The 16th section of the act declares that it shall not enable any person (otherwise than as they were then enabled) to hold or exercise any office, place or dignity belonging to the Church of England and Ireland or Scotland, or any office of ecclesiastical judicature, or belonging to any cathedral, or collegiate, or ecclesiastical foundation, or any office in any of the universities, or in any of the colleges of the universities, or of Eton, Westminster, or Winchester, or any college or school in this realm, or to repeal or interfere with any local statute or rule established in any university, college or school by which Roman Catholics are prevented from being admitted thereto, or from residing or taking degrees therein, nor enable any person, otherwise than as by the law then established, to exercise any right of presentation to any ecclesiastical benefice, nor to repeal the laws then in force

(*c*) *Jack* d. *M'Guirk* v. *Reilly*, 2 Hudson & Brooke, 301.

(*d*) *Attorney General* v. *Power*, 1 Ball & B. 150.

respecting the right of presentation to any ecclesiastical benefice (*e*). By statute 2 and 3 Will. IV. c. 115, it is enacted, that after the passing of that act (15th August, 1832) his majesty's subjects professing the Roman Catholic religion—in respect to their schools, places for religious worship, education and charitable purposes in Great Britain, and the property held therewith, and the persons employed in or about the same—shall in respect thereof be subject to the same laws as the Protestant Dissenters are subject to in England, in respect to their schools, places for religious worship, education and charitable purposes, and not further or otherwise.

The third section of the act provides, that nothing therein contained should affect any suit actually pending or commenced, or any property then in litigation, discussion or dispute, in any of his majesty's courts of law or equity in Great Britain (*f*). And the fifth section enacts, that all property to be acquired or held for such purposes of religious worship, education and charitable purposes in *England* and *Wales*, should be subject to the provisions of the act 9th George II. c. 36, and to the same laws as the Protestant Dissenters were subject to in England, in respect of acquiring or holding of such property (*f*).

This statute has been decided to be retrospective, and two cases have established the validity of bequests for carrying on the good designs of Catholic schools—and for promoting the knowledge of the Catholic Christian religion among the poor and ignorant inhabitants of certain specified districts in England; but gifts to Roman Catholic priests for saying masses for the testator, have been held to be illegal.

A testator by his will, dated 7th March, 1820, gave to his executors therein named, or such of them as should prove and undertake the execution of his will, the sum of 300*l.* upon trust to pay the same to the treasurer, or to the trus-

(*e*) See stat. 1 Will. & Mary, sess. 1, c. 26; 12 Anne, st. 2, c. 14, s. 1; 11 Geo. II. c. 17, s. 5; Cruise's Dig. tit. 21, c. 2, pl. 41—43.

(*f*) See *Bunting* v. *Williamson*, on the construction of 18 Geo. III. c. 60; Butl. Co. Litt. 391 a., n., sect. iii.

(*g*) See *post*. chap. iii.

tees of the Catholic school, in *Wigan*, in the county of *Lancaster*, which sum he charged upon his personal estate, and ordered that it should be paid out of the same, and applied for the use of and towards carrying on the good designs of the said school. And he also gave to his executors the further sum of 200*l.* upon like trusts, for the benefit of the Catholic school in *Liverpool;* and the testator, after giving several other pecuniary legacies, bequeathed the residue of his personal estate to the plaintiff. The testator died on the 6th May, 1823, the executors proved the will, and a bill was filed on behalf of the plaintiff, an infant, for the administration of the testator's personal estate; the cause was heard before the Master of the Rolls, and the usual decree made for taking an account of the testator's personal estate. The legacies of 300*l.* and 200*l.* were by an order on further directions, dated 1st June, 1830, and by another order in 1833, directed to be carried over to the accounts of the *Wigan* and *Liverpool* Catholic schools respectively, but not to be paid without notice to the executors. The trustees of the *Wigan* school presented a petition, praying for payment of the legacy of 300*l.*, which petition was heard before the Vice-Chancellor, on the 1st August, 1833, when his Honour declined making any order, being of opinion that the legacy was not within the 2nd & 3rd Will. IV. c. 115; inasmuch as the third section of that act provides, that nothing contained in it shall affect any suit actually pending, or any property then in litigation, discussion or dispute in any court of law or equity. A petition of re-hearing having been presented to the Lord Chancellor by the plaintiff, praying that the orders directing the legacies to be carried over to the accounts of the respective Catholic schools, might be reversed; that the legacies might be declared void, and that the sums carried over might be declared to be part of the testator's residuary personal estate; Lord Chancellor *Brougham* was of opinion, that the act of the 2nd & 3rd Will. IV. c. 115, was retrospective; and that, as the trustees of the school were not litigant parties in the suit, which was a mere suit for the administration of the testator's

estate, the case did not fall within the exception in the third section of that act. The petition was accordingly dismissed, and the trustees of the Catholic schools were declared to be respectively entitled to the legacies of 300*l.* and 200*l.* (*g*).

In another case, the testatrix, after giving several legacies, some of which were for charitable purposes, as to the rest and residue of her estate and effects, gave the same to Sir *John Lawson*, and *S. Scroope*, and she appointed three other persons her executors. There was then a paper entitled, "Omitted in my will, chapels and priests—to the chapel of St. George's in the Fields, London Road, 10*l.*" Similar legacies were given to three other chapels named, and after other small legacies, came this note—"Whatever I have left to priests and chapels, it is my wish and desire the sums may be paid as soon as possible, that I may have the benefit of their prayers and masses." There was a letter signed by the testatrix, and addressed to Sir *John Lawson*, and *S. Scroope*, Esq., which had been proved as testamentary, as follows: "Gentlemen, I have herewith sent a duplicate of my will, whereby you will perceive that I have taken the liberty of bequeathing the residue of my property to you, in confidence that you will appropriate the same in the manner most consonant to my wishes, which are as follows—namely, that the sum of 10*l.* each be given to the ministers of the Roman-Catholic chapels at Greenwich, St. George's in the Fields, Sutton Street Soho Square, and York, for the benefit of their prayers for the repose of my soul, and that of my deceased husband *George Townsend;* and that the remain-

(*g*) *Bradshaw* v. *Tasker*, 2 Mylne & Keen, 221.

"On the petition of the treasurer and of the trustees of the Catholic school in Liverpool, it was ordered, that the sum standing to their account should be paid to the treasurer, or to the other petitioners as trustees of the said Catholic school in Liverpool, or some of them; and it was referred to the master to tax the costs of the plaintiff and defendant, of the application and consequent thereon, as between solicitor and client, and the amount of such costs to be paid by the testator's executors out of the money in their hands, part of the testator's personal estate."—*Bradshaw* v. *Tasker*, 29 July, 1834. Reg. Lib. (A), 1833, fol. 1190.

der be appropriated by you in such way as you may judge best calculated to promote the knowledge of the Catholic Christian religion among the poor and ignorant inhabitants of *Swaledale* and *Wensleydale*, in the county of York."

On a bill filed by the next of kin of the testatrix, who claimed the benefit of those legacies which could not be carried into effect by reason of their being given to superstitious uses, it was contended, that there was no charitable purpose expressed by the testatrix; the praying for her soul and the soul of her husband, being purely a superstitious object, as well as the direction to apply the residue of her property to propagate the Roman Catholic religion among the poor and ignorant inhabitants of certain districts; and that the act 2 & 3 Will. IV. c. 115, did not render legal donations for the purpose of propagating the Roman Catholic religion among any portion of his majesty's subjects; which was, in effect, the same thing as converting them to a religion contrary to that established by the law. The residue of the testatrix's property, therefore, being personal, and having been given, not to a charitable, but to a superstitious purpose, the plaintiffs as next of kin were entitled to it.

Sir *C. Pepys*, M. R., decided, that the gift of the residue of the personal estate not consisting of interests in land, for the purpose of promoting the Catholic Christian religion, was valid within the 2nd & 3rd Will. IV. c. 115, because that act had been held to be retrospective by Lord *Brougham* (*h*), and because the property in this case could not be said to have been in dispute at the time of passing that act in 1832, within the third section of the act, inasmuch as the letter which raised the question was not proved until 1834; and because the terms of the bequest were substantially the same as those in *Bradshaw* v. *Tasker*, and Roman Catholics now came within the same principle as that settled as to Protestant Dissenters, with respect to their schools and places of worship (*i*).

(*h*) *Ante*, p. 113.

(*i*) See *Attorney General* v. *Pearson*, 3 Mer. 409; *Attorney General* v. *Hickman*, 2 Eq. Cas. Abr. 193, pl. 14; *Waller* v. *Child*, Ambl. 524, *ante*, pp. 104, 105.

His Honour was of opinion, that the bequests to priests and chapels, were not intended for the benefit of the priests personally, nor for the support of the chapels generally, but for the purpose of obtaining prayers and masses for the soul of the testatrix; and held, that the same were void, on the ground of the general illegality of their objects, and not because they came in terms within the statute 1 Edward VI. c. 14. The court also decided, as no charitable purpose was expressed in the will as to these legacies, that the duty of directing the application of them did not devolve upon the crown, but that the next of kin of the testatrix were entitled to stand in the places of the chapels and priests, as to the legacies given to them (*k*).

In concluding the subject of superstitious uses it may be remarked, that a grant of an annuity fraudulently obtained by a dissenting minister, having a spiritual ascendancy over a woman who was in a state of religious delusion, was set aside upon principles of public policy (*l*); and upon the same ground, a settlement made by a widow upon a clergyman and his family, was set aside, because it had been obtained by undue influence and abused confidence (*m*).

(*k*) *West* v. *Shuttleworth*, Rolls, 16 April, 1835, MS. Reg. lib. (B), 1834, 575, 577.

The general rule is that a residuary bequest of personalty includes every thing falling in, either on account of the legacy being *void*, or lapsing by the death of the legatee in the testator's lifetime; *Durour* v. *Motteux*, 1 Ves. sen. 322; *Kennell* v. *Abbott*, 4 Ves. 803; *Cambridge* v. *Rous*, 8 Ves. 14—25; *Bland* v. *Lamb*, 5 Madd. 412; *S. C.* 2 Jac. & Walk. 399. If the will shows that the testator intended to give only what he had at the execution of his will, a limited construction has been put on the residuary bequest, so as to exclude the legatee from taking lapsed legacies. *Attorney General* v. *Johnstone*, Ambl. 577; *Davers* v. *Dewes*, 3 P. Wms., 42; *Ommanney* v. *Butcher*, 1 Turn. & Russ. 260, 2 Rop. on Leg. 582—590, 3rd ed.

(*l*) *Norton* v. *Relly*, 2 Eden, 286; *S. C.* 1 Coll. Jur. 458.

(*m*) *Huguenin* v. *Baseley*, 14 Ves. 273. By the civil law, which entirely prohibits donations *inter vivos* from persons standing in certain relations, on the ground of the influence which they must necessarily possess, the case of a confessor is included.—*Pothier, Traité des Donations entre Vifs*, s. 1.

CHAPTER III.

OF THE STATUTE 9 GEO. II. c. 36, RESTRAINING THE DISPOSITION OF LANDS TO CHARITABLE USES.

SECT. I.—*Of the General Object of the Statute* 9 *Geo. II. c.* 36.

II.—*Of Conveyances and Purchases within the* 9 *Geo. II. c.* 36.

III.—*Of Devises and Bequests of Lands and Personal Estate within the* 9 *Geo. II. c.* 36.

IV.—*Of Bequests of Money to be laid out in the Purchase or Improvement of Real Estate.*

V.—*Of Bequests of Personalty which Fail on account of being connected with a Devise of Real Estate.*

VI.—*Of the Right of Heirs-at-Law, Devisees, and next of Kin of Testators, to the Benefit of Void Devises and Bequests to Charitable Uses.*

VII.—*Assets not Marshalled in Favour of Charities.*

VIII.—*Of Exemptions from the Statute* 9 *Geo. II. c.* 36.

SECTION I.

Of the General Object of the Statute 9 *Geo. II. c.* 36.

THE object of the statutes of mortmain properly so called, which have been considered in a former chapter (*n*), was to prevent the conveyance of lands to bodies corporate; the statute of 9 Geo. II. c. 36, applies to conveyances and de-

(*n*) *Ante*, pp. 5—17.

vises of lands or any interest in them, as well to individual trustees, as to bodies politic, for charitable purposes; but no case comes within that act unless the gift be for a charitable use (*o*).

The statute 9 Geo. II. c. 36, s. 1, after reciting that gifts or alienations of lands in mortmain were prohibited by *Magna Charta*, and other wholesome laws, as prejudicial to the common utility, and that such public mischief had greatly increased by many large and improvident dispositions made by languishing or dying persons to *charitable uses*, to take place after their deaths, to the disherison of their lawful heirs (*p*), enacts, that after the 24th day of June, 1736, no lands or other hereditaments whatsoever, nor any sums of money, or any other personal estate whatsoever, to be laid out or disposed of in the purchase of any lands or hereditaments should be given, or any ways conveyed to any person or persons, bodies politic or corporate or otherwise, for any estate or interest whatsoever, or any ways charged or incumbered by any person or persons whatsoever in trust, or for the benefit of *any charitable uses whatsoever*; unless such gift or conveyance of any such lands or hereditaments, sums

(*o*) 2 Marsh. 71. See *ante*, pp. 58—82, where the different *charitable uses* are enumerated.

(*p*) This act is said to have originated in consequence of several heirs at law having suffered considerably by injudicious, ostentatious dispositions, by the owners of lands to charitable and other uses; and the case of one Mr. Mitchell, who was going to leave a very large estate in land to one of the Universities, is mentioned. The bill passed the House of Commons by a large majority, but was much opposed in the House of Lords; and petitions against it from the two Universities and other charitable institutions were presented.

It was argued against the bill, that though there were many hospitals in the kingdom, that they were far from being sufficient for the purposes designed; and that there was such a deficiency in every branch of public charity, as to render it both uncharitable and unwise to make a regulation which would very much prevent the increase of all public charitable funds. One argument in favour of the bill was the danger to be apprehended from too great a liberty of granting lands in mortmain, lest any particular society should become so powerful as to be able to prescribe laws to the government and overturn the constitution. See Parl. Hist. 1736, Vol. IX. 1110 n.

of money, or personal estate (other than stocks in the public funds), be made by deed executed in the presence of two or more credible witnesses, twelve calendar months before the death of such donor or grantor, (including the days of the execution and death,) and be inrolled in the Court of Chancery within six calendar months next after the execution thereof; and unless such stocks be transferred six calendar months before the death of such donor or grantor (including the days of the transfer and death), and unless the same be made to take effect in possession for the charitable use intended immediately from the making thereof, and be without any power of revocation, reservation, trust, condition, limitation, or agreement whatsoever, for the benefit of the donor or grantor, or of any person or persons claiming under him.

The second section of the act "provides that nothing hereinbefore mentioned relating to the sealing and delivering of any deed twelve calendar months before the death of the grantor, or to the transfer of any stock six calendar months before the death of the grantor or person making such transfer, shall extend, or be construed to extend, to any purchase of any estate or interest in lands, tenements, or hereditaments, or any transfer of any stock to be made, really and *bonâ fide* for a full and valuable consideration, actually paid at or before the making such conveyance or transfer, without fraud or collusion."

This section of the act has been explained by a recent act to have been intended only to prevent such purchases from being avoided by reason of the death of the grantor, within 12 calendar months after the sealing and delivery of the deed relating thereto, and not wholly to exempt such purchases from the operation of the act (*q*).

The 3rd section of the 9th Geo. II. c. 36, provides "that all gifts, grants, conveyances, appointments, transfers, and settlements whatsoever of any lands or other hereditaments,

(*q*) 9 Geo. IV. c. 85, which confirms all purchases for valuable consideration made prior to that act, for charitable purposes, to take effect in possession which had not been avoided by suits at law or in equity, or then the subject of any such suit.

or of any estate or interest therein, or of any charge or incumbrance affecting any lands or hereditaments, or of any stock, money, or other personal estate, or securities for money to be laid out or disposed of in the purchase of any lands or hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting the same, to or in trust for any *charitable uses* whatsoever which shall at any time after the said 24th day of June, 1736, be made in any other manner or form than by that act directed and appointed, shall be absolutely and to all intents and purposes null and void." This statute, which has been said by several judges to be founded on good sense and sound policy (*r*), was made to prevent the mischief arising from improvident alienations or dispositions to charitable uses by dying or languishing persons. The object of the act was wholly political, grew out of local circumstances, and was intended to have merely a local operation. For a long series of years devises to charitable uses in this country had not only been wholly unrestrained, but had received a more liberal construction than other gifts; and had become so excessive in their amount that the Legislature deemed it expedient, as there was so much land already in mortmain, to lessen the facility of placing more in that situation (*s*). The very liberal construction adopted by the courts in favour of charitable gifts, was perhaps another reason which occasioned the statute. The particular views of the Legislature were, first, (as expressed in the title of the act) to restrain the disposition of lands whereby the same became unalienable, it being considered of great importance in a trading country to allow the free alienation of lands; and, second, to prevent testators in their last moments from being imposed on by mistaken notions of religion, in giving away their estates from their heirs or families (*t*).

(*r*) 2 Eden, 210; 3 Barn. & Ald. 151; 2 Jac. & Walk. 275.

(*s*) 2 Mer. 161; 3 Atk. 147.

(*t*) *Attorney General* v. *Day*, 1 Ves. sen. 223; *Durour* v. *Motteux*, *Id.* 321; *Attorney General* v. *Lord Weymouth*, Ambl. 20, 2 Eden, 209; *Curtis* v. *Hutton*, 14 Ves. 541; *Price* v. *Hathaway*, 6 Madd. 312; *Sorresby* v. *Hollins*, 9 Mod. by Leach, 222;

Lord *Hardwicke* said "that the statute was not at all aimed against perpetual charities merely as such, or to prevent the establishment or creation of them, but was designed against the cases of perpetual charities in lands; and as the title imports, to restrain the disposition of lands whereby the same become unalienable. The whole recital and enacting part of the statute take notice only of the unalienable disposal of land whereby heirs are disinherited, and therefore the alienation or conveyance of lands to such purposes is prohibited; and though there is a clause to prohibit money being laid out in lands to such purposes as would make them unalienable, yet there is no restriction whatsoever upon any one from leaving a sum of money by will or any other personal estate to charitable uses, provided it be to be continued as personalty; and the executors or trustees are not obliged or under a necessity of laying it out in land, by virtue of any direction of the testator for that purpose" (*u*).

In construing acts of Parliament, the first thing to which attention must be paid is, to find out the general object of the Legislature; one object of this act was certainly to prevent land being put out of circulation; but that was not the only object, as it may be done by deed; and personal property may be given to be invested in land for a charity, under the regulations contained in the act. The principal

Attorney General v. *Harley*, 5 Madd. 321; where it was contended that the true intention of the act was according to its title. Lord *Hardwicke* said that the intent was taken up much too short, for the title is no part of the act, as had been often determined; nor ought it to be so considered in the construction of the act, for originally there were no titles to the acts, but only a petition and the king's answer, and the judges thereupon drew up the act into forms and then added the title, which does not pass the same form as the rest of the act, only the speaker, after the act has passed, mentions the title and puts the question upon it; and therefore the meaning of the act is not to be inferred from the title, but the act itself must be considered; *Attorney General* v. *Lord Weymouth*, Ambl. 223. It has been repeatedly held, that the title of a statute is not part of the act. Barrington on Stat. 337, 338; 1 Bl. R. 95; 6 Mod. 62; but see 4 T. R. 491; 3 T. R. 137; Dwarris on Stat. 219, 653—655.

(*u*) *Sorresby* v. *Hollins*, 9 Mod. by Leach, 222; *S. C.* 2 Burn's Eccl. L. 555, 8th ed.; 1 Coll. Jur. 439.

object of the Legislature seems to have been to prevent improvident dispositions upon the approach of death; when a person having his end in contemplation, would probably take an erroneous view with regard to a pious and charitable disposition; and to protect such persons, and those who would represent them, from the inclination to make such a disposition at a time, when, with regard to their families and natural claims upon them, an act, the most improvident and improper, might appear to them to be the wisest (*v*).

Courts of equity construing this statute as highly remedial, have given it the most extensive construction, and to promote its object, have departed from the rules they apply in all other cases, and will not marshal assets in favour of a charity for no other reason, but that a law so highly remedial and providing against so great an evil, as such dispositions in prospect of death, should have the most extensive operation (*w*).

This statute does not apply to Ireland, where there is no similar act (*x*), nor to Scotland, nor to the island of Grenada in the West Indies; the object of the act being wholly political, and so framed as to be quite inapplicable to that or any other colony. For, as observed by Sir *W. Grant*, in its causes, its objects, its provisions, its qualifications, and its exceptions, the act is a law wholly *English*, calculated for purposes of local policy, complicated with local establishments, and incapable, without great incongruity in the effect, of being transferred as it stands into the code of any other country (*y*).

(*v*) See *Mackintosh* v. *Townsend*, 16 Ves. 335.

(*w*) *Attorney General* v. *Tyndall*, 2 Eden, 207; *S. C.* Ambl. 614; *Foster* v. *Blagden*, Ambl. 704; *Hillyard* v. *Taylor*, *Id.* 713. See *post.* sect. vii.

(*x*) *Attorney General* v. *Power*, 1 Ball & B. 154.

(*y*) *Attorney General* v. *Stewart*, 2 Mer. 143.

On the application of the laws of England to her colonies, see *Calvin's* case, 7 Rep. 34, 1 Bl. Com. 108, 2 P. Wms. 75; *Campbell* v. *Hall*, Cowp. 204; *Blankard* v. *Galdy*, 2 Salk. 411; *Smith* v. *Brown*, *Id.* 666; *Rex* v. *Vaughan*, 4 Burr. 2500; *Ex parte Prosser*, 2 Br. C.C. 325; *Evelyn* v. *Forster*, 8 Ves. 96; *Ex parte Anderson*, 5 Ves. 240; *Sheddon* v. *Goodrich*, 8 Ves. 481; *Pike* v. *Hoare*, Ambl. 428; *S. C.* 2 Eden, 185, and note.

SECTION II.

Of Conveyances and Purchases within the Statute 9 *Geo. II. c.* 36.

1. *Copyholds are within the Act.*
2. *Of Reservations to the Grantor,* p. 124.
3. *Of Inrolment of the Conveyance,* p. 129.
4. *Of Purchases within the Second Section of the Act,* p. 131.

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1. *Copyholds are within the act.*] Copyholds are within this statute, whether given by will (*z*), or conveyed by the party in his lifetime. Where it appeared, that in 1743, certain copyholds were surrendered "to the use of certain persons therein named, their heirs and assigns, for ever, in trust nevertheless, to and for the use, benefit, and habitation of the poor of the town of *Rothwell* for ever." The trustees were admitted in 1743, and the heir of the surviving trustee was admitted in 1813. No evidence was given to show when the surrenderor died. In an action of ejectment brought by the heir of the surviving trustee, it was held, that the surrender was void by the statute 9 Geo. II. c. 36; none of its provisions having been complied with, and that copyholds were within that act. On a motion for a new trial it was contended, that a conveyance of copyholds was not within the act, inasmuch as a copyhold could not be conveyed by bargain and sale, the mode prescribed by the act; and that if a bargain and sale and inrolment were necessary, that they might be presumed to have existed after such a long enjoyment. But it was held by the court, that copyhold lands are within the mischief intended to be remedied by the statute 9 Geo. II. c. 36, and therefore included in the general words of it. And although copyholds must pass by surrender, and

(*z*) *Arnold* v. *Chapman,* 1 Ves. sen. 108.

not by bargain and sale, yet it is clear, that the uses of the surrender may be declared by deed indented and inrolled (*a*).

It is a general principle of law with respect to deeds made void by statute, or by common law, as *contra bonos mores*, that the proof of their invalidity may be collected not only from the instrument itself, but from circumstances not appearing upon the face of it. It is not necessary therefore, that the charitable or superstitious trust for which the conveyance is made, should appear upon the conveyance; for if it were so, the statute might always be evaded. A declaration of trust by one of several persons to whom the property is conveyed, is evidence of the purpose against all (*b*).

2. *Of reservations to the grantor.*] A conveyance under this act must take effect in possession, therefore, where a person more than twelve calendar months before his death, assigned a lease for the term of 991 years, to trustees upon trust, within one year after his death, at the expense of his estate to erect almshouses thereon, to be enjoyed as therein mentioned; there being a resulting trust to the grantor for life under the deed of assignment; it was held void within this act, not being to take effect in possession from the making thereof (*c*).

It has been decided, that a trust in a conveyance to charitable uses, for keeping up the grantor's tomb, is not the reservation of a benefit within this act; that the fact of the grantor's remaining in possession of the property from the time of the grant till his death, does not vitiate the deed, unless it was in consequence of a tacit condition annexed to it at the time of the execution, which is a question to be decided by a jury; and that a conveyance to charitable uses and for other purposes, although void as to the former, is valid as to the latter, the statute not making such a deed void altogether.

Thus where it appeared that a meeting-house and burial-ground, were before and at the time of the conveyance, held

(*a*) *Doe* d. *Howson* v. *Waterton*, 3 Barn. & Ald. 149.

(*b*) *Doe* d. *Wellard* v. *Hawthorn*, 2 Barn. & Ald. 102; *post*, p. 136.

(*c*) *Limbrey* v. *Gurr*, 6 Madd. 151.

by a society of Quakers, under a yearly rent of 2*l.* 10*s.*, and that a burial-vault and tomb over it, used by the family of the grantor, were standing on the burial-ground. By indentures of lease and release executed and inrolled as required by the statute, a messuage or farm called *Meeting-house Farm*, with the several fields thereto belonging, and also the meeting-house and burial-ground, and burial-vault and tomb standing upon the said fields, were conveyed to *Mavor* and *Smith*, and their heirs, to the uses and upon the trusts following, *viz.*, As to the meeting-house and burial-ground with the appurtenances (except the vault and tomb, &c.), to the use of the trustees, their heirs and assigns, so long as the same should be used by the society of Quakers, and they should pay to the trustees the yearly rent of 2*l.* 10*s.*, and keep the same in repair; and after the determination of that estate as to the meeting-house and burial-ground, and immediately after the execution of the said conveyance as to all other the premises, and also as to the rent of 2*l.* 10*s.*, during the continuance of the limitation aforesaid, to the use of and in trust for *Mavor*, his heirs and assigns, upon condition that he, his heirs and assigns, should, from time to time, and at all times thereafter, repair and keep in repair, the vault and tomb, and brick-work and fences thereto belonging, and, if need be, re-build the vault and tomb, and permit the same to be used as a family vault, for the grantor and any of her family who might desire to be interred therein; and in default thereof, his estate to determine, and from and after the determination of that estate to *Smith*, his heirs and assigns, for ever. And there was power for *Smith* to enter from time to time, to see the condition performed; and for the Quakers to build a new meeting-house upon a different site, and a declaration that then the new site should be subject to the same uses and conditions as the old, and the old site subject to the same uses as the farm, &c. The grantor died in 1810; having, from the conveyance in 1789, to the time of her death, received the several rents of the Meeting-house Farm, and the meeting-house and burial-ground, and having made her will, under which the plaintiff, who sought to recover the property in an ejectment,

claimed. At the trial there was a verdict for the plaintiff, for the meeting-house and burial-ground; and for the defendants for the farm, subject to the opinion of the court, and if the court should be of opinion that the said grant of the farm was void, then a verdict was to be entered for the plaintiff for all the premises mentioned in the deeds.

Lord *Ellenborough*, C. J., "The question reserved is upon the statute of mortmain, whether this grant of the *Meeting-house farm* is void, which is granted as ancillary to a trust for keeping up a tomb. It does appear, I think, a charitable use in part, and in part not; as far as concerns the grantor's own interment it is not, but inasmuch as it is for *her family*, it may be so considered; but then the statute has been complied with. It is said, however, that here is a reservation of some collateral benefit to the donor or person claiming under the donor, but I cannot find that; all that is reserved is in furtherance and execution of the trust. The object of the statute was to prevent a reservation, under colour of a charitable use, of some *substantial benefit* to the donor himself. The whole object of this use was keeping up a tomb for herself and family. As to the objection—that this deed did not take effect in possession, the statute only requires that it should be made to take effect in possession, and it is so made; if there were any secret reservation or trust, which was to be evidenced by her remaining in the possession of the rents for about 19 years, should not that have been more properly made a question before the jury? we can only look at the instrument itself, and cannot draw any such inference" (*a*).

There is no difference between a transaction illegal at common law and by statute, when an attempt is made to set aside a deed; and therefore a deed may be void in part and good in part, although it contain a use prohibited by statute. A statute, when it prohibits a thing, may go further, and say that the *deed* by which it is done shall be void, and then a court of law must decide that it is void to

(*a*) *Doe* d. *Thompson* v. *Pitcher*, 3 Maule & S. 407.

all intents and purposes, because the Legislature has said so; but a court of law cannot so decide where the Legislature says that a part is legal. Although the statute makes the grant of an interest in land to charitable uses void, it does not avoid the deed altogether; and a conveyance to charitable uses as far as it affects other lands not appropriated to such uses remains good. Therefore in the *last case*, on another ejectment being brought to recover the *Meeting-house Farm*, exclusive of the meeting-house and burial ground, on the ground that the deed being void as to part could not be supported as to the rest; it was held by the court, that the deed was not wholly void, but good so far as it affected lands not appropriated to charitable uses, though it contained a conveyance of some property to a charitable use, and that the part then in question with respect to the repair of the vault was not void, because it was not a charitable use (*e*).

Where a conveyance to charitable purposes is immediate, a reservation of a power to the grantor of appointing objects of the charity and of making regulations for the future conduct of it, will not render the deed void. Thus where a person who had erected a chapel upon her own land by deed duly inrolled within the time limited by the statute 9 Geo. II. c. 36, conveyed it unto and to the use of trustees and their heirs upon trust, that they and their successors should from time to time and at all *times after the decease of the grantor* appoint preachers to expound and teach the gospel, and persons to collect contributions from the attendants at the chapel for their pews; and upon trust to expend such contributions in keeping the chapel in repair, and to pay the residue to the ministers of the chapel for the time being. The grantor ordained, that the trustees should after her decease make such rules and bye-laws for the better management of the chapel and the preachers therein, as should seem requisite. The deed provided that it should be lawful

(*e*) *Doe* d. *Thompson* v. *Pitcher*, 2 Marsh. 61; *S. C.* 6 Taunt. 359; See *Greenwood* v. *Bishop of London*, 1 Marsh. 310; *S. C.* 5 Taunt. 727; *Norton* v. *Summers*, Hob. 13; *Collins* v. *Blantern*, 2 Wils. 351; *Maleverer* v. *Radshaw*, 1 Mod. 35.

for the *grantor*, who thereby reserved to herself absolute and exclusive power from time to time and at all times during her natural life, by writing under her hand to appoint such ministers to officiate in the said edifice as to her should seem meet, without the intervention, intermeddling or interruption of the said trustees or their successors for the time being; and that ministers to be appointed by her should receive the contributions to the said chapel in such shares and manner as she should direct. And the grantor also reserved to herself exclusive authority during her natural life, by any writing under her hand and seal, to make any further or other directions for the better management of the said edifice or building, or for the more decent and orderly ministration of religious worship therein."

It was determined by Lord *Thurlow* that the deed was valid, as it purported an *immediate* conveyance to the trustees, under which they might have taken possession immediately; and as some of the trusts for collecting and distributing the contributions were to be *immediately* executed by the trustees, which was not varied by their subsequent conduct, (none of whom, except one, whom the grantor had married, interfered with the management of the chapel): for the powers reserved were not "reservations *for the benefit of the grantor*," but merely powers to appoint preachers and to make regulations for the *future conduct of the charity;* and there was no power reserved which enabled the donor to defeat the charitable use itself, nor after the execution and inrolment of that deed to apply the chapel, or the land on which it stood, to her own use and benefit (*f*).

An assignment executed more than twelve months before the grantor's death and duly inrolled, of a leasehold estate to which the grantor was entitled for a term of years with benefit of renewal, to the master, fellows and scholars of Trinity College, Cambridge, and their successors "in trust, to permit the rector for the time being of a parish to hold, use and occupy the same during his incumbency, or otherwise to

(*f*) *Grieves* v. *Case*, 2 Cox, 301.

receive and take the issues and profits thereof for his own use and benefit" was held to be valid, and not affected by the circumstance of the grantor being himself rector of that parish at the time of the grant, and retaining the deed in his own possession.

For the grant did not contain any reservation, and the gift took effect immediately in possession, and there was no power of revocation, nor trust, express or implied, from which the grantor, in his individual capacity, could derive any benefit; and although it was said that it appeared on the face of the deed, the grantor was rector, and his gift was a gift for the benefit of the rector, yet it must on the other hand, be acknowledged that it was a case for which the statute had made no provision, and which was entirely out of its contemplation; that the gift itself was absolute and irrevocable; the benefit which the grantor enjoyed under it only accidental; his enjoyment of the property no longer as owner, but attached to the situation in which he happened to be placed; the moment he quitted that situation he lost all enjoyment of the property, and that might be by circumstances over which he had no control, by deprivation, or appointment to a higher benefice, perhaps at the moment when he had executed the instrument. The Legislature had no intention or thought of precluding that sort of incidental advantage; and to construe the statute otherwise, would be to prohibit a rector from bestowing any endowment on his own living (*g*).

3. *Of inrolment of the conveyance.*] A conveyance of lands, or any interest in lands, to charitable uses, must be executed twelve calendar months before the death of the grantor, and inrolled in chancery within six calendar months after its execution; the non-compliance with those requisites of the act, renders such a deed void, and the grantor may himself take advantage of the want of inrolment, and recover the property conveyed, in ejectment (*h*).

(*g*) *Attorney General* v. *Munby*, 1 Mer. 327, 342.

(*h*) *Doe* d. *Wellard* v. *Hawthorn*, 2 Barn. & Ald. 96; *Doe* d. *Preece*

It is sufficient if the deed be executed by the *grantor* at the time of its inrolment, although the *grantees* have not executed it (*i*).

It should seem that inrolment is only required on the original *gift* to charitable purposes, and consequently, that a conveyance from old trustees, or the heir of the surviving trustee, to newly appointed trustees upon the trusts declared by the first gift, would not require inrolment; but it may be advisable, in order to avoid any question upon the subject, to inrol a conveyance to new trustees.

The court will not, after a period of 70 or 80 years, presume in favour of a charity that a bargain and sale has been inrolled, upon the ground, that as certain forms are required by statute, the judges are not at liberty to presume against the policy of the law, and by dispensing with such forms, to give to the charity an estate in the conveyance of which they had not been observed; although one of the judges remarked, that it might have been otherwise if there had been a chasm in the records (*k*). So in an action for dilapidations by a rector, it appeared, that the absolute seisin in fee of the land upon which part of the buildings in question stood, was in certain devisees after the statute 9 George II. c. 36, and that no conveyance had been inrolled according to the first section of it, nor any disposition made of it to any college according to the fourth section; it was held, that though successive rectors had been in possession of the land for above 50 years past, yet no presumption could be made of any such conveyance having been inrolled, (which, if it existed, the party might have shewn,) and consequently, that the rector had no title to the land; although it appeared also, that one of those devisees was the then rector, and that the title to the living was in Baliol College, Oxford (*l*).

A conveyance of lands to charitable uses, which fails on

v. *Howells*, 2 Barn. & Ad. 744; *Attorney General* v. *Munby*, 1 Mer. 327.

(*i*) *Grieves* v. *Case*, 2 Cox, 301.

(*k*) *Doe* d. *Howson* v. *Waterton*, 3 Barn. & Ald. 149; *ante*, p. 123. See 1 Jac. & Walk. 619, 620.

(*l*) *Wright* v. *Smythies*, 10 East, 409.

account of the death of the grantor within twelve months, does not revoke a prior will; thus, where a testatrix seven days after having duly made a will, in execution of a power devising estates to trustees, conveyed part of the property to trustees for a charitable foundation, by a deed of bargain and sale, which was duly inrolled in chancery in her lifetime; and nine days after the execution of such deed, she made a codicil to her will, attested by three witnesses, by which she appointed another trustee, and ordered her money which was out on mortgage to be first applied in payment of debts, and died within a year after the execution of the deed; it was held, that the testamentary appointment was not revoked, as to the freehold estates comprised in the conveyance (*m*).

4. *Of purchases within the second section of the act* (*n*).] The express intention of the first section of the act is to render it unlawful for any person to give any land or money to be laid out in land for any charitable use whatsoever, which is not qualified by the second section, so as to leave a person at liberty within twelve months to give to charitable uses, any land which within the twelve months he has purchased for a full and valuable consideration; for the mischief which the act intended to guard against is not less, because the grantor by whose improvident disposition the land be-

(*m*) *Matthews* v. *Venables*, 2 Bing. 136; *S. C.* 9 Moore, 286. This was a case from chancery, and the reasons of the court do not appear, it was, perhaps, decided upon the ground, that the codicil amounted to a re-publication of the will, or that the gift to the charity was a complete nullity, or a *conditional* disposition, to take effect only in case the donor lived to the end of 12 months.

It seems to be settled that imperfect conveyances as a bargain and sale without inrolment, or a feoffment without livery of seisin, though not sufficient to pass the estate, will operate as a revocation of a prior devise.—1 Roll. Abr. 615, pl. 6, 1 Ves. sen. 178, 180, 187; *Mountague* v. *Jeoffreys*, Moore, 429, *S. C.* Poph. 108, 1 Roll. Abr. 615, pl. 4. See 3 Atk. 72, 73; *Sparrow* v. *Hardcastle*, 3 Atk. 803, 1 Bl. R. 349; see *Vawser* v. *Jeffrey*, 16 Ves. 519, *S. C.* 2 Swanst. 268, 3 Barn. & Ald. 462; *Shove* v. *Pincke*, 5 T. R. 129; *Eilbeck* v. *Wood*, 1 Russ. 564, 1 Powell on Devises by Jarman, 583—588.

(*n*) See *ante*, p. 119.

comes inalienable, had not been the owner of it for twelve complete months: therefore, where a party having purchased certain lands and hereditaments, which by his direction were conveyed by the vendor by bargain and sale, duly inrolled in Chancery, to trustees for charitable purposes, and the donor died within twelve calendar months after the execution of the conveyance; it was held to be void under the act, which, it was contended, enabled a person to *purchase* lands for charitable uses within twelve months of his death, although he could not *convey* his own lands for that purpose within that time (*o*).

Lord *Hardwicke* said, that if a large personal estate is left to trustees for a charitable use, which they direct, and there is no occasion to come to a court of equity for direction, there is nothing in the statute 9 George II. c. 36, restraining the trustees from laying out that in land, because by the express proviso, all purchases to take effect in possession are good, although the court would never direct the fund to be laid out in land (*p*). But it has lately been decided, that a trustee cannot indirectly give effect to a bequest contrary to the mortmain act, by purchasing lands after the testator's death; and therefore, where a trustee to whom a legacy was bequeathed upon trust, to purchase lands for charitable purposes, received the money and with it bought lands which were conveyed to himself upon the trusts expressed in the will, it was held, that the trust so executed, being contrary to the mortmain act, would not be carried into effect by the Court of Chancery (*q*). So a bequest of money for enabling a trustee of a charity to complete a contract for the purchase of land, is void by the statute (*r*).

Where a decree by consent had been made for investing a sum of money given for a charity in the purchase of lands,

(*o*) *Price* v. *Hathaway*, 6 Madd. 304. It appears that the vendor in this case claimed to retain the lands without repayment of the purchase money, but the court directed an inquiry for the heir-at-law of the donor.

(*p*) *Vaughan* v. *Farrer*, 2 Ves. sen. 188.

(*q*) *Attorney General* v. *Ackland*, 1 Russ. & Mylne, 243.

(*r*) *Corbyn* v. *French*, 4 Ves. 431.

one moiety of which became vested in a tenant in tail, against whom no decree for completing the contract could be made, the court refused to carry the decree as to the other moiety into effect, as well on account of the inconvenience of making the charity tenant in common with another person, as on the ground that the particular transaction had a tendency to evade the statute.

A testator being likely to die, made a conveyance of a real estate for the benefit of a charity, and ten days afterwards, by his will gave 3,000*l.*, the exact value of that estate, and 250*l.* to the same charity, and gave the estate to two persons as tenants in common. On a bill for the direction of the court for the settlement of the testator's estate under his will, the master was directed to receive a scheme for carrying it into execution, and to consider in what way the money should be laid out, and a perpetual fund created for the maintenance of the charity. The master reported a scheme for laying out the 3,000*l.* in the purchase of the lands devised, and the 250*l.* in other lands convenient for building the charity school. A decree was afterwards made by the court confirming that report, and directing the scheme and other matters therein contained, to be carried into execution, which was not opposed. On an information brought on behalf of the charity to have the purchase carried into effect against the person entitled to one moiety of the estate under one of the original devisees, and against the infant son of the other devisee, who had settled his moiety of the estate on himself in tail. On the question whether the parties were entitled to the aid of a court of equity, in carrying the purchase into execution, Lord Chancellor *Hardwicke* said, "I cannot say this is strictly contrary to the provision of the 9th Geo. II. c. 36. The first clause of which was intended to relate to gifts or conveyances to a charity by way of donation. And it is plain, that the Legislature did not intend absolutely to forbid all kind of purchases of lands for the benefit of a charity; but has put them under some restrictions. The proviso was inserted in the *House of Lords* upon mention of the case of the charity of *Queen Anne's*

Bounty, which could not otherwise have gone on; as the method of executing it is, that the money arising from that fund is laid out in purchase of real estate for the augmentation of poor vicarages. Another consideration was, that this was not intended to prevent the execution of charities already established; in several of which, the funds are vested in trustees, with intent to lay out in lands; particularly *Dr. Ratcliff's* charity: but to leave them open, restraining the increase of such donations *in futuro* (*t*); that it should not be in the power of any person, or of a court of equity, to direct subsequent gifts of money to a charity to be laid out in land; for if that was their meaning, they might as well have rejected the whole bill; as the consequence would be, that a person might leave money to his executors, who might bring a bill in equity, praying a decree for laying it out in lands; yet in this very clause relating to purchases, it might be considered how far they are taken out of the statute. The meaning was, that where such purchases are made, they should not be left precarious in point of time; so that though the party should happen to die within the twelve or six months, yet the person who paid the money should not lose his purchase, or be put to risk the recovery of it back, as there might not be assets, or stocks might fall. But then the money must be actually paid, in which case, I doubt whether the other restrictions, exclusive of the limitation in point of time in the life of the party, will take place on this proviso, and am rather of a different opinion; for sometimes the money is paid on articles before a perfect conveyance; and then it would be sufficiently taken out of the act, notwithstanding the circumstance of the deed indented and inrolled is not complied with; the intention of

(*t*) Sir *J. Leach*, V. C. said, in *Price* v. *Hathaway*, 6 Madd. 313, that the object of the second section is correctly stated by Lord *Hardwicke* in the above case, it having been suggested by the case of *Queen Anne's* Bounty, and other existing charities, where money was from time to time to be laid out in land, and was meant to protect such purchases, and to remove a doubt that seemed to have been entertained, that vendors in such cases might be considered as grantors within the first section.

the act being complied with, by the actual payment and conversion made of one kind of estate into another; but in the present case, the money has not been paid. But supposing this doubtful; consider whether it would not be contrary to the true intent and principles of the act? Had this matter been fully entered into at the making that order, as it is now, I think I should not have made it; but it passed *sub silentio* then, the parties agreeing; and the objections not being laid before the court. There is something in this case, which may lay a great opening to evade the act, although the testator might not have intended any such fraud; but if such a precedent were made, it would be followed by a person, who knowing, if he died within a year after the conveyance, the act would make it void, gives the exact value thereof in money the same way; and then the one to be laid out in the purchase of the other. The testator's intent makes it worse, and creates a reason against it." But the court refused to carry the decree into execution, on the ground that one share of the estate had descended to an infant tenant in tail, against whom, the court would not make a decree; and the court in judging for the charity, would not decree the money to be laid out in the purchase of an undivided moiety; and therefore the bill was dismissed without costs(*u*).

In the *Attorney General* v. *Davies* (*v*), Sir *William Grant*, M. R. said, one of the grounds of refusing to execute the agreement in the *Attorney General* v. *Day* was, that it would be an evasion of the statute, and an indirect method of giving land to a charitable use. If the statute would have been evaded even by that sort of bargaining between representatives, because it might be supposed to originate from an intention indicated by the will, it is quite clear that a direct bargain by the will, offering money as a consideration for putting land in mortmain, would be a direct infringement of the statute; as it would be an absurd distinction, that a testator should not give land to a charity; but that he might

(*u*) *Attorney General* v. *Day*, 1 Ves. sen. 218.

(*v*) 9 Ves. 543; *post*, pp. 177, 178.

give money in consideration of another's giving land for that purpose.

In order to bring a case within the second section of the act, the consideration must be paid by the person for whose benefit the conveyance is made; and therefore, where a panper in custody for having left his family chargeable to a parish, in consideration of the sum of 174*l.* which had been expended by the parish officers in maintaining his family, made a conveyance of lands for the term of 60 years if he should so long live, in trust for the churchwardens and overseers of the poor and inhabitants of the parish, to the intent that the rents might be applied for their use in aid of the rate for the relief of the poor, it was held that such conveyance was not within this section of the act; for the consideration was not paid by the persons who were benefited by the conveyance, but out of the poor rates levied upon the persons who resided and paid rates during the time when the relief was granted to the pauper's family (*w*).

Where a party being possessed of a piece of land for the residue of a term of years, in the year 1796 completed at his own expense a chapel or meeting house on part of the land, and in the year 1806, 800*l.* was subscribed by the congregation there assembled for public worship, for enlarging and improving the same; and in consideration of the money being so subscribed, and that it should be expended for those purposes, such lessee agreed to grant an underlease of the chapel for a term of years by way of security to the congregation for laying out so large a sum of money upon the premises; and accordingly a lease for 23 years in the common form was executed to 12 persons as lessees of "all that messuage, tenement, chapel or meeting house, situate in *Dartford*, and which then was, and for many years past had been used as a place for the worship of Almighty God, by a society or congregation of Protestants assembling under the patronage of the trustees of the late Countess of *Huntingdon's* College," rendering a peppercorn rent during the life of the lessor, and after his decease, a rent of 10*l.* *per annum*

(*w*) *Doe* d. *Preece* v. *Howells*, 2 Barn. & Ad. 744.

for the remainder of the term. And on the 13th October, 1806, upon the back of the said lease was indorsed a declaration of trust, purporting to be by all the lessees, but which was in fact only executed by four; by which it was declared, that they would during the remainder of the term, stand possessed of the chapel or meeting house, upon trust for the use and benefit of the society or congregation then assembling at the chapel or meeting house, maintaining certain doctrines therein particularly described. But that in case the society or congregation of Protestants holding the doctrines aforesaid, should be totally dissolved or dispersed, and the public worship at the chapel discontinued by them for the space of twelve calendar months together, then upon further trust, to assign the premises to such person, and for such *civil purposes* as to the lessees should seem meet, or the survivors of them should unanimously agree. The chapel had always been used as a place of public worship for the congregation mentioned in the declaration of trust. On an ejectment being brought by the lessor for recovering the chapel against the minister who had possession, which had been previously demanded of him, the court thought that the purposes for which the lease was granted as stated on the face of it, without the declaration of trust, brought it within the statute. It was decided, that the case did not come within the exception in the statute, for the 400*l.* was not a valuable consideration paid to the landlord for granting the use of the premises, but was money laid out for the purpose of enlarging the building for public worship, which was for the convenience of the congregation themselves, without any reference whatever to the interest of the landlord, and therefore that the lease was void, and that the declaration of trust contained an acknowledgment that the lease was granted for a purpose which in point of law is a charitable use (*x*).

(*x*) *Doe* d. *Wellard* v. *Hawthorn*, 2 Barn. & Ald. 96. See *ante*, p. 124.

SECTION III.

Of Devises and Bequests of Lands and Personal Estates within the Statute 9 *Geo. II. c.* 36.

1. *Of Wills executed before the act by Testators who died after.*
2. *Of Words which will create a Trust,* p. 141.
3. *Of Honorary and Secret Trusts,* p. 144.
4. *Bequests of Leaseholds,* p. 154.
5. *Bequests of Money due on Mortgages, Tolls, Poor-rates, and County-rates,* p. 154.
6. *Money given to exonerate Lands in Mortmain,* p. 161.
7. *Money charged on Real Estate,* p. 163.
8. *Money to arise from the Sale of Real Estate,* p. 164.

The statute having provided that all gifts to charitable uses affecting lands must be by deed (*y*), it follows, as a necessary consequence, that all devises of lands or any interests in them to any of the purposes already enumerated in a former chapter (*z*), will be void.

The statute avoids the whole devise, and not merely the illegal trust; therefore land given by will to charitable uses will descend to the heir-at-law—the third section of the act making void all assurances of any lands or any estate therein to or in trust for any charitable uses whatever (*a*). But if part of the trust be good, it seems that it will support the legal estate (*b*).

1. *Of Wills executed before the act by testators who died after.*] Devises to charitable uses executed before this statute, were valid, although the testator did not die until after the act had come into operation. Thus where a testator in 1734,

(*y*) *Ante,* pp. 118, 119.

(*z*) *Ante,* pp. 58—82.

(*a*) *Ante,* pp. 119, 120; *Adlington* v. *Cann,* 3 Atk. 155; *Doe* d. *Burdett* v. *Wrighte,* 2 Barn. & Ald. 710. See *Doe* d. *Toone,* v. *Copestake,* 6 East, 328.

(*b*) 1 Ves. sen. 187.

made a devise to charitable uses and died in 1736, a month after the new statute of mortmain came into operation, without having revoked his will, it having been certified by the judges, on a case from the Court of Chancery, that such devise was good notwithstanding the act, the will was established, and the trusts of the charity directed to be carried into execution (*b*). So a devise before the act was held not to be rendered void by a codicil made after, not disturbing the charitable trust, but devising to the same use and adding two more trustees, although the codicil attempted to unite another piece of land in the trust (*c*). So a will, executed before the statute, directing B. to settle a freehold estate to pay a sum not exceeding 100*l.* *per annum* upon such a trust, for such a part of the poorer people of a parish as he should think to be a most proper charity; and B. in pursuance thereof, by will executed *after the statute*, appointed a sum less than the 100*l.* per annum, it was held that the appointment was not avoided by it, as the execution of the power had relation to and was part of the will (*d*), and therefore no more affected by the statute than a will inchoate before the statute where the testator died after it (*e*): for the statute respected only the disposition of owners, and not the case of persons executing a power given before it; but that the amount to be appointed was *discretionary* in B. and not to be increased, under the 43rd Eliz. c. 4, to the whole amount given by the will to A. (*f*).

The execution of a trust created by a will executed before the statute, by a testator who died after, was decreed by the Court of Chancery. Sir *George Downing*, by will dated in December, 1717, devised freehold, copyhold and leasehold estates to trustees and their heirs in trust (after the determination of prior limitations in his will, which afterwards failed,) to purchase with the rents, the inheritance of a piece of ground in

(*b*) *Ashburnham* v. *Bradshaw*, 2 Atk. 36. See *Attorney General* v. *Andrews*, 1 Ves. sen. 225.

(*c*) *Willet* v. *Sandford*, 1 Ves. sen. 178, 186.

(*d*) Co. Litt. 112 a.

(*e*) *Attorney General* v. *Bradley*, 1 Eden, 482.

(*f*) *S. C. ibid*; See *Rumbold* v. *Rumbold*, 3 Ves. 69.

Cambridge, proper for the erecting a college, with other buildings fit for that purpose, to be called *Downing College*, and to obtain a royal charter for the founding of such college, and incorporating a body collegiate by that name in the University of Cambridge; which should consist of such head or governors, and of such fellows, scholars, members and other persons for the time being; and should be maintained, governed and ordered by such rules and orders, and in such manner, and should be professed and taught such useful learning, as his trustees and their heirs, with the consent of the Archbishops of Canterbury and York, and the masters of *St. John's College*, and *Clare Hall*, in Cambridge, in being at the founding the same college, should direct and appoint; and from and after the founding and incorporating such college, or body corporate, the said trustees and their heirs, should stand and be seised of all and singular his manors, &c., in trust for the said collegiate body and their successors, for ever; and he gave his leaseholds upon the same trusts. The testator died in 1749. And upon an information at the relation of the chancellor, masters, and scholars of the University of Cambridge, after his death, it was declared, that the trusts of the will ought to be carried into execution, in case the king should be pleased to grant his charter to incorporate the college, and his royal license for such incorporated college to take the devised premises in mortmain, and the heirs-at-law of the testator were to be at liberty to apply to the crown for that purpose (*g*).

But where a testator, previously to the statute, devised his real estate, and also his personal estate to be laid out in land for a charity, and by a codicil, not attested, subsequent to that act, confirmed the will; it was held to operate as a new will as to the personalty, and consequently to be void as to that (*h*).

Where A. before the statute, gave real and personal estate

(*g*) *Attorney General* v. *Downing*, Dick. 414; *S. C.* Wilmot's Notes, 1—35; Ambl. 550, 571; 3 Ves. 714; 5 Ves. 300; 8 Ves. 256. A charter of incorporation was granted 22nd Sept. 1800.

(*h*) *Attorney General* v. *Heartwell*, 2 Eden, 234; *S. C.* Ambl. 451.

to a use that would be within the statute, and to another use that would not be affected by it; and B., after the statute, gave personal estates to the uses of A.'s will; the estate of A. having been sufficient for the first use, the whole of the second gift was decreed to the valid use (*i*). So, a will in favour of a charity, executed before the act, was held to be revoked by codicils made after it came into operation, in favour of a particular devisee, founded on erroneous advice given to the testator, that the will was void by the act (*k*).

2. *Of words which will create a trust.*] Trusts may be created not only in express terms, but by any words of a testator intimating a *request, wish, hope, desire, recommendation, &c.* where the property given is *certain,* and the *objects* to be benefited by it are precise and distinct (*l*). Therefore, if a testator gives property, whether real or personal to another, absolutely or for life, and adds words of the above import, whence it may be inferred that the testator intended that the devisee on his death should give all or a definite portion

(*i*) *Attorney General* v. *Hartley,* 4 Br. C. C. 412.

(*k*) *Attorney General* v. *Lloyd,* 3 Atk. 551; *S. C.* 1 Ves. sen. 32.

(*l*) *Brest* v. *Offley,* 1 Ch. Rep. 130; *Parry* v. *Juxon,* 3 Ch. Rep. 21; *Eades* v. *England,* Prec. Ch. 200, *S. C.* 2 Vern. 466, 1 Eq. Abr. 297, pl. 3; *Clowdsly* v. *Pelham,* 1 Vern. 411; *Jones* v. *Nabbs,* 1 Eq. Ab. 404, pl. 3; *Richardson* v. *Chapman,* 1 Burn. Eccl. Law, 240; *Vernon* v. *Vernon,* Ambl. 3; *Clifton* v. *Lombe,* Amb. 519; *Massey* v. *Sherman,* Amb. 520; *Nowlan* v. *Nelligan,* 1 Br. C. C. 489; *Pierson* v. *Garnet,* 2 Br. C. C. 38, 226; *Lewis* v. *King,* 2 Br. C. C. 600; *Horwood* v. *West,* 1 Sim. & Stu. 387; *Parsons* v. *Baker,* 18 Ves. 476; *Taylor* v. *George,* 2 Ves. & B. 378; *Forbes* v. *Ball,* 3 Mer. 437; *Lansdowne* v. *Lansdowne,* 2 Bligh, 92; see 2 Roper on Legacies, 373—389, 3rd ed. But it is otherwise where the *gift* or the *object* appears to be *uncertain. Palmer* v. *Schribb,* 2 Eq. Abr. 291, pl. 9; *Buggins* v. *Yeates,* 9 Mod. 122; *Harding* v. *Glyn,* 1 Atk. 469; *Le Maitre* v. *Bannister,* 2 Br. C. C. 40; *Bland* v. *Bland,* 2 Br. C. C. 43; *S. C.* 2 Cox, 349; *Harland* v. *Trigg,* 1 Br. C. C. 142; *Wynne* v. *Hawkins,* 1 Br. C. C. 180; *Sprange* v. *Barnard,* 2 Br. C. C. 585; *Hill* v. *Bishop of London,* 1 Atk. 620; or where the gift confers the absolute ownership on the devisee, enabling him to diminish the capital in his lifetime.—See *Cunliffe* v. *Cunliffe,* Amb. 686; *Curtis* v. *Rippon,* 5 Madd. 434.

of such property to certain objects pointed out and ascertained by the testator, a trust in their favour will be created.

Words of *expectation* in a will, not amounting to recommendation, will not create a trust, particularly where the words apply not simply to the property given by the testator, but to all the property, having no certainty of amount, which the parties might happen to possess at their deaths (*l*).

Although no trust can be enforced in equity unless the property given is certain, and the objects to be benefited are also certain, yet in the case of charities (under the doctrine of *cy pres*, as will be hereafter shewn), a bequest to charitable purposes however general, will not fail on account of the uncertainty of the objects, but the court will apply the property in favour of objects not specified by the testator, as near as possible to his probable intention (*m*).

It may be observed, that the current of modern decisions has been against converting a legatee into a trustee (*n*).

This broad rule was laid down by Lord *Alvanley*, wherever any person gives property, and points out the object, the property, and the way in which it shall go, that does create a trust, unless he shows clearly, that his desire expressed is to be controlled by the party; and that he shall have an option to defeat it. The word *recommend* proves desire, and does not prove discretion. If a testator shows his desire that a thing shall be done, unless there are plain words or necessary implication that he does not mean to take away the discretion, but intends to leave it to be defeated, the party shall be considered as acting under a trust. Recommend is a request and more, to request a man to do anything is to recommend it, and *vice-versâ*. The words cannot be distinguished (*o*).

(*l*) *Lechmere* v. *Lavie*, 2 Mylne & K. 197.

(*m*) *Attorney General* v. *Davies*, 9 Ves. 405; *Attorney General* v. *Coopers' Company*, 19 Ves. 189; *Attorney General* v. *Wansay*, 15 Ves. 234; *Ex parte Jortin*, 7 Ves. 340.

(*n*) *Sale* v. *Moore*, 1 Sim. 534; *Meredith* v. *Heneage*, *Id.* 542; *Wright* v. *Atkins*, 1 Ves. & B. 313; *S. C.* 1 Turn. & Russ. 143.

(*o*) *Malim* v. *Keighley*, 2 Ves. jun. 335, 529. See 7 Price, 221.

Thus where a testator devised real estates unto and to the use of *G. Sharp*, his heirs and assigns for ever, and added these words: "But my wish and desire is, that the said *G. Sharp* do in his lifetime, by proper deeds, convey, settle and assure the said manor, capital messuage, farm, lands and hereditaments to some charitable uses, *subject to an annuity*, to take place at his decease, and not before; the particular uses to be limited I leave entirely to his discretion, having the fullest confidence as well in his judgment of the choice of proper objects, as in his integrity in the disposition thereof, according to the wish by me expressed; but it is my intent and meaning that the said *G. Sharp* shall enjoy the said estate, subject as aforesaid to his own proper use and behoof during his life." It was held, that *G. Sharp* took an estate for life only, for the fee was given for the purpose of enabling him to execute a trust forbidden by the statute 9 Geo. II. c. 36, which avoids not merely the trust but the legal estate given: for otherwise a party might consider himself bound in honour, though not in law, to convey the estate to the uses prohibited. The gift being accompanied with words "wish and desire," the devisee could not enjoy the estate for his own benefit; and the object of the devise being sufficiently definite, the Court of Chancery, but for that statute, would have fixed the particular charitable uses to which the estate was to be applied (*p*).

But where a testator devised an estate to the preacher of a meeting-house for his life only, on express condition that he should without delay convey the same to trustees "for the use and support of the preaching of the word of God at such meeting-house for ever;" and in case such preaching should be discontinued, the testator directed the same to be applied towards a school for teaching the poor children of *Lyndhurst* for ever; and gave to the preacher full and absolute authority to settle the same accordingly. On an ejectment by the testator's heir-at-law, it was held that the preacher took an estate for life, though the subsequent limitation was void.

(*p*) *Doe* d. *Burdett* v. *Wrighte*, 2 B. & Ald. 710.

And that the defendant's religious persuasion raised no objection to his taking the estate, and that the devise over to the school in case the preaching should be discontinued, only related to the limitation after the defendant's death (*q*).

3. *Of honorary and secret trusts.*] This statute intended to prevent all trusts or devises for charities by any art or contrivance; and an *honorary* trust will avoid a will as much as one declared in the most solemn manner. *Nemo potest facere per obliquum, quod non potest facere per directum.* Therefore, where by a will attested by three witnesses, lands were devised to three persons and the heirs of the survivor, and a bill by the testator's heir-at-law stated that it was upon a secret trust for a charity, declared by an instrument executed at the same time as the will, noticing the statute of mortmain, and requesting the executors to apply his estates for charitable purposes, and attested by two witnesses only, which was admitted by the answer. The court decreed that the devise and bequest were an intended trust for the benefit of a charity, and as such were void by the statute, so far as they related to the charity (*r*).

A devise was held to be void, and a re-conveyance decreed in favour of an heir-at-law, where it was proved to have been made upon a secret trust for a charity; and conveyances had

(*q*) *Doe* d. *Phillips* v. *Aldridge*, 4 T. R. 264. Lord Commissioner *Ashhurst* said, giving due merit to this case, perhaps it was not looked into as much as it might have been. The ground of it was, that it was nothing more than a bequest beneficial to the party, without annexing to it a stipulation of preaching in the chapel, which made it a charitable bequest as to the future preachers; *Grieves v. Case*, 1 Ves. jun. 554. See *post*.

(*r*) *Boson* v. *Statham*, 1 Eden, 508; *S. C.* 1 Cox, 16. See *Bishop* v. *Talbot*, cited 6 Ves. 60. A note or memorandum in writing from a trustee promising to execute a declaration of trust, *Bellamy* v. *Burrow*, Cas. Tem. Talbot, 97; an answer in chancery confessing a trust, *Hampton* v. *Spencer*, 2 Vern. 288; *Cottington* v. *Fletcher*, 2 Atk. 155; a letter from a trustee disclosing the purposes of a devise to him, *Crook* v. *Brookeing*, 2 Vern. 106; if they sufficiently discover the intention of the parties, will be evidence of trusts in a court of equity.

been made by the devisees and trusts declared, although they denied by their answer having made any promise (*s*).

It is settled that charitable uses and trusts come within the seventh section of the statute of frauds (*t*), which requires all declarations, or creations of trusts or confidences, of any lands or hereditaments to be manifested and proved by some writing, signed by the party who is by law enabled to declare such trusts or by his last will in writing, or else they are void. Thus it was clearly held that a will made before this act must have been duly executed to create a charitable use, and that the court will not set up a trust for a charity without a declaration in writing. By will of the 1st of August, 1738, the testator, after reciting that A. had conducted his affairs with great integrity for many years, that B. had served him for about 20 years as his housekeeper with great fidelity, devised to A. and B. and their heirs, all his messuages, &c. and gave to his only child and heir-at-law a small legacy; and strictly enjoined her to submit to the disposition he had thereby made, as she was handsomely provided for by his marriage settlement and otherwise. After the testator's death, a paper writing, signed by him, was found, of the 9th of August, 1738, wherein he recommended his executor A. to assist B. and to see the will performed according to his humble request, and according to the wonted and charitable disposition of the said A. towards all men, to bring the whole affair to its desired issue. It was in proof that the testator had a little before his death given directions for the plan of a public building; and several witnesses were also examined to prove his intent to leave his estate for building a school or hospital. A bill was brought by the heir-at-law, seeking a discovery of a secret trust, alleged to have been left by the testator, and to have the devise set aside as void by the statute of *mortmain*. The defendants insisted on the will as an absolute gift to them, and that no parol evidence of a trust for a charitable purpose was admissible by the statute of

(*s*) *Edwards* v. *Pike*, 1 Eden, 267. *General* v. *Barnes*, 2 Vern. 597.

(*t*) 29 Car. II. c. 3. See *Attorney*

frauds. Lord *Hardwicke*, after stating it to have been frequently determined that devises to charities and for charitable purposes were within the statute of frauds, said the next consideration was, whether the paper writing of the 9th of August was a sufficient declaration of trust; and he thought it was not. Had the testator made a feoffment to himself and his heirs, that paper, he said, might have been a good declaration of trust within the other clause of the statute of frauds; but the principal case was that of a will, which passed both the legal and beneficial interest to the devisee. The will was dated the 1st of August and the paper the 9th of August, so that if the paper did any thing, it must enure as a revocation of the will, which it could not do for want of a proper execution within the statute of frauds; as trust estates could no more pass by any writing not properly attested, according to the 6th section, in the presence of three or more witnesses, than legal estates could; and therefore the bill was dismissed (*u*).

(*u*) In this case the defendants pleaded as to so much of the bill as sought the discovery of the secret trust, or any parol or other declaration of trust of the real and personal estates of the testator not made by him in writing and not signed by him, that the testator was seised in fee and by his will disposed of his estates absolutely to the defendants and their heirs; and that by the statute 29 Chas. II. c. 3, all declarations or creations of trust of any lands should be manifested by some writing, signed by the party or by his last will, or else should be utterly void; and therefore that the discovery of such parol declarations of trust, as sought by the bill, was no ways material to the plaintiff's case, and that the defendants were not obliged to answer it, and therefore pleaded the will and act in bar. In answer to the rest of the bill, one defendant denied that certain alleged or any other directions had ever been given to her by the testator, touching any charitable use or any other trust whatsoever. Both the defendants likewise denied that they were ever named or appointed in any writing, to their knowledge, to have the management of any charitable use as trustees, or that the testator signified to them, in any kind of writing, his design to settle his estate, in trust, for the benefit of any charitable uses. The plea was ordered to stand for an answer, with liberty to except; and the benefit of the plea was saved till the hearing of the cause.—*Adlington* v. *Cann*, 3 Atk. 141; *S. C.* Barn. 130. See also *Lloyd* v. *Spillet*, 2 Atk. 148; *S. C.* Barn. 384, 3 P. Wm.'s 344; 8 Vin. 149, pl. 32. See *Boson* v. *Statham*, 1 Eden, 514.

The case of *Adlington* v. *Cann*, seems to have proceeded on the ground that there was nothing in the will attaching a trust; for although the testator afterwards, by an unattested paper expressing his own intention not communicated to the devisees, said, his purpose was to devote the estate to a charitable use; yet the devisees might object, that they had taken under a will well executed, and were not affected by a subsequent paper, to which they were strangers, not attested according to the statute of frauds. But it is very different where the devise is made upon a previous engagement by the devisees binding their conscience, and there is a privity of purpose between them and the testator (*x*).

Courts of equity will not allow the statute of frauds to be used to cover a fraud; and, therefore, if a devisee undertakes to pay a sum of money to a third party, and in consideration of it an estate is given to him, he will be compelled to answer a bill filed for the purpose of establishing the claim (*y*). For notwithstanding the statute of frauds, the court will interpose to prevent a party from being deprived of his rights by means of fraud. So the court will compel persons to discover secret agreements, made with a view to evade the provisions of the statute of mortmain, and will call upon devisees to state whether they took an estate devised to them, as they legally cannot do, for charitable purposes; and a devisee must answer a bill of this kind, resting simply upon an allegation without evidence or inference from the will, showing that they were to take upon trusts for charity. Thus, where a bill was filed by an heir-at-law, stating that the testator, being seised in fee of certain lands, and being desirous of devising the same for erecting a chapel thereon for the sect called Methodists, but knowing that an express devise for that purpose would be void, as within the statute of mortmain, requested the defendant to undertake, in case he devised the premises to him, to build the said chapel thereon, and the defendant having undertaken so to do, the testator, by his will, dated 27th April, 1802, devised to the defendant and

(*x*) See 9 Ves. 519. (*y*) 6 Ves. 67; 9 Ves. 519.

his assigns the said premises; the bill stated the entry of the defendant upon the premises, and that the devise having been made upon an implied trust, that the defendant would upon the devised premises build a chapel, was void, and that the heir-at-law was entitled; and charged, that the defendant did, before the testator made his will, enter into some agreement with him, or in some manner promise, or undertake, or give him to understand, that if he would devise the estate to the defendant he would erect a chapel thereupon; and that the testator would not have devised the estate to him, had he not entered into such agreement, or given such promise, &c., or that there was some implied undertaking or agreement between him and the testator, that the defendant should erect a chapel, &c., and that it was his intention, in case he retained the land, to build a chapel thereon—and that he had frequently acknowledged in conversation, that the estate was devised to him upon some such secret trusts as aforesaid, or for some other charitable purposes. The bill therefore prayed a discovery; that the devise might be declared void, as within the statute of mortmain; and that the defendant might deliver up possession, and render an account. The defendant, as to so much of the bill as sought a discovery as to the supposed agreement, promise, undertaking or acknowledgment, and as to the relief, pleaded in bar the statute of frauds, 29 Charles II. c. 3, and averred, that he never did sign any writing whereby he declared any trust or confidence concerning the lands devised. Lord *Eldon* said, "It would be a strong proposition, that the providence of the Legislature, having attempted expressly to prevent a disposition of land for purposes of this sort, was so short as to be baffled by such a transaction as is stated by this bill; the statute was never permitted to be a cover for fraud upon the private rights of individuals; and, though within the intention, it cannot be said a trust is declared under these circumstances, it is clear a trust would be created upon the principle on which the Court of Chancery acts as to fraud. In the ordinary case of an estate suffered to descend, the owner being informed by

the heir, that if the estate is permitted to descend, he will make a provision for the mother, wife, or other person, there is no doubt the court would compel the heir to discover whether he did make such promise (*z*). So, if a father devises to his younger son, who promises that if the estate is devised to him he will pay 10,000*l.* to the eldest son, the court would compel the former to discover whether that passed in parol—and if he acknowledged it, even praying the benefit of the statute, he would be a trustee to the value of 10,000*l.*; and then why, upon a similar principle, should not a trust be raised as to the whole value of the estate, the promise extending to the whole? It would be singular, if the court would protect individuals, and would not act to prevent a fraud upon the law itself. But it is not necessary to decide this case upon the dry principle, the cases alluded to in *Muckleston* v. *Brown* (*a*), being an authority upon it." The plea was ordered to stand for an answer, with liberty to except; the defendant to make what he could of praying the benefit of the statute in his answer (*b*).

So, where a bill filed by the co-heirs-at-law of the testator stated, that he, being seised of a manor and estates, applied to the defendants to act as trustees in the execution of certain trusts, upon which he had devised or bequeathed, or proposed to devise or bequeath the residue of his real and personal estate; and that they, or some, or one of them, having agreed to take upon themselves or himself the execution of the trusts, as the testator then did or should declare; that the testator by his will, dated in August, 1793, after devising certain estates to his co-heirs-at-law, and giving

(*z*) See the following cases of this kind:—*Thynn* v. *Thynn*, 1 Vern. 296, 1 Eq. Cas. Abr. 380, pl. 6; *Reech* v. *Kennegal*, 1 Ves. sen. 123; *S. C.* Ambl. 67; *Drakeford* v. *Wilks*, 3 Atk. 539; *Barrow* v. *Greenough*, 3 Ves. 152; *Mestaer* v. *Gillespie*, 11 Ves. 621; *Chamberlain* v. *Agar*, 2 Ves. & B. 259; *Podmore* v. *Gunning*, 5 Sim. 495.

(*a*) 6 Ves. 52. See *Attorney General* v. *Duplessis*, Park. 144; *Martin* v. *Hutton*, and *Bishop* v. *Talbot*, cited 6 Ves. 60—62.

(*b*) *Stickland* v. *Aldridge*, 9 Ves. 516—520.

several legacies, gave and devised all other his real estates not before disposed of, and the residue of his personal estate, subject to the payment of debts and legacies, to the defendants and their heirs, and appointed them executors of his will. The testator, by a codicil, gave estates which he had purchased since the making of his will, to the defendants and their heirs, "Upon trust, for the like uses and purposes as his manor and estate at *Overseal*, (which was included in the devise of the residue in the will,) now stand limited," and legacies of 1000*l.* each to two of the defendants; the plaintiffs contended, that it was manifest from the codicil, that the devise to the defendants was as trustees, and that the testator did not intend them to take any beneficial interest in the residue of his estates. A letter from *Gisburne*, one of the defendants, to the other, stated, that about the spring of 1789, the testator had explained his wishes and intentions to him, saying that he proposed to give part of his estates to his heirs-at-law, and after providing certain legacies, to bequeath the whole residuum of his estates, real and personal, to his executors, "not, however, for their private emoluments, but in full confidence, that conformably to his intentions, they would have laid out the whole of it in *charity*, or for charitable uses;" it did not appear that the testator mentioned any particular charities, but that he would not specify any trusts in the will, from fear of invalidating it. The other defendant in a statement made by him in February, 1800, stated, that he considered the testator's intention to be, that a considerable part of the estate was to be disposed of to charitable uses—and another part, perhaps considerable, was to be given in private donations, not only to those who were objects of charity, but to persons who had claims upon the testator's generosity. The bill charged, that the testator had not legally declared the trusts, and that if he had declared the same, they were as to the real estate of the testator, of which he was seised at the time of his death, void; and prayed a discovery, and that the plaintiffs might be declared entitled, as co-heirs, to the residue of the testator's real estates, and

the rents and profits received by the defendants, and general relief. The defendants put in a general demurrer to the discovery and relief.

Lord *Eldon* said, that he had not any conception that any answer the defendants ever would put in would vary the case; but he must suppose it was possible the defendants might upon their oath give a different account from that which the bill alleged they had given; it was not immaterial, that the suggestion of the bill that the testator applied to them to act as trustees, was much fortified in *Gisburne's* letter; for it admitted he had a communication with the testator as early as 1789; the allegation was, that he applied to them to act as trustees in the execution of certain trusts, upon which he had devised or bequeathed, or proposed to devise and bequeath, the residue of his real and personal estate; and that they agreed to take upon them the execution of the trusts, as he did then, or should duly declare; which meant "effectually declare." But still, if it was necessary to put the case upon that ground, that they had agreed to accept the devise upon such trusts as he should duly declare, his lordship said, he was not quite prepared to say it is clear, that if he made the devise, meaning at the time, thereafter duly to declare trusts, and it happened that he did not declare any, that sort of case would not be within the equity of the court; and whether if they admitted his will was made upon an undertaking that they would execute such trusts, the heir would not have a right to say, no trust was duly declared: the purpose therefore failed, and the trust results by law to him, not upon the intention, but upon the ground that there is no intention; and he is entitled to avail himself of that, upon that ground, therefore, the bill must be answered (*c*).

His lordship also held, that though it must necessarily be admitted that if there were nothing more than the will and codicil he must put this construction upon the latter, that the words "uses, trusts, &c." would be satisfied by that which

(*c*) 6 Ves. 63, 64.

was really not a use or a trust, but a mere charge upon the real estate; if it should be necessary to have resort to it in case of a deficiency of the personal estate, yet upon the will and codicil, attending to the particular nature of the expressions and the inference to be thence deduced, with the allegation that the defendants did undertake to take by a devise expressive of some uses, intents and purposes, the court is authorised to hold that though this might have been the construction of the will and codicil alone, it may not be the construction, the whole case being taken together. The letter of *Gisburne* disclosed communications between him and the testator, from 1789 to the execution of the will and codicil, and *Gisburne* appeared to have enjoyed a great deal of his confidence. It was most distinctly disclosed in that letter that the testator projected an evasion of the law. Whether he looked to private donation or public charity, whatever was the nature of the charity he meant to establish, a distinct communication appeared in that letter, that he dared not put his purpose in writing, on account of the statute of mortmain. That is a purpose, in aiding which the court could go no further than the law obliged, either on the part of him who projected it or of him who promoted it, by adopting the execution of it. On the other hand, the court could go no further in destroying that purpose than the law furnishes the means; but the policy of the law requires that courts of justice should distinctly state that it is incorrect conduct in both the party who projects, or carries into execution such a purpose. An intention was disclosed in the letter of *Brown* not altogether consistent with the other; but it was not to be denied that each of those papers left a great deal to be disposed of in charity, according to the declarations of the testator himself; and if the declaration of trust reserved to the defendants a power of disposing to such charities as they should think proper, Lord *Eldon* was not quite sure the heir-at-law had not a right to call upon them to say whether they had done so or meant to do so, and how much they meant to dispose of, and to give him the rest. It was a fair subject of argument whether *Gisburne's* apprehension of the testator's

meaning would bind the court; or whether the court would not say, from the apprehension of the testator as to the statute of mortmain, the purpose would apply to the whole of the property. A very material part of the bill was the allegation that the defendants pretend the testator has, by some writing or otherwise declared the trusts, upon which they were intended to take the residue of the real estate, and that they are willing to hold upon such trusts; and charging that the testator has not legally or in any effective manner declared the trusts; and if he has declared them, they are as to the real estate of which the testator was seised at the time of his death, null and void. They might be void at his death, but good at the time they were created. Surely the heir has a right to know whether the trusts were legally declared, and continued effectual to the testator's death. If bound to answer those questions, they may say there was a trust in writing, and that, if effectual, they must act according to it. The heir may say the trust was not well declared, or has become ineffectual in the whole or in part. In this view of the case, beyond all question the defendants must answer this bill; and if they must answer as to any of the allegations, it is very unnecessary to say at present whether they must answer as to the other part. His lordship would not prejudice that part of the case further than by saying, that upon an allegation of that kind, a trust against the policy of the law, the court insisted they should answer it (*d*).

An answer to a bill to discover a secret trust, which stated that it was not for the benefit of the plaintiff, was held insufficient on exceptions, for the defendant made himself judge of the title; and it was said by the court, perhaps it might be a trust for a charity (*e*).

Where a bill was filed by an heir-at-law against residuary devisees, suggesting a secret void trust for charitable purposes, and there was no evidence of a trust expressed, nor

(*d*) *Muckleston* v. *Brown*, 6 Ves. 65—67. It appears that this case, having been argued upon the answer admitting the trust, was compromised; 9 Ves. 518, n.

(*e*) *Newton* v. *Pelham*, 2nd Aug. 1746, cited 1 Eden, 514.

of such an engagement by words or by silence as would authorise the court to say, the devisees undertook to do that, which prevented the testator from imposing it upon them as a trust, the bill was dismissed with costs, unless the heir would take an issue *devisavit vel non* (*f*).

4. *Bequests of Leaseholds.*] Gifts of leaseholds to charitable uses are void, whether specifically bequeathed (*g*) or included in a residuary clause, either by name (*h*) or in a general description of the testator's personal estate (*i*); although it was insisted, in an early case (*k*), that the words of the statute "any estate or interest whatsoever" only applied to a devise by a testator of his own land, and not to that which he held as lessee; but the distinction was overruled on the annulling clause. So where a testator, who was possessed of a lease for years from the crown of the right and power of laying chains in certain parts of the river *Thames* for mooring ships, and of all profits to arise therefrom, by his will devised the same to charitable uses, the lease was held to be a grant of an interest in land, and within the statute of mortmain, for it was clearly a franchise; and though the chains were moveable, it was no more personal than fairs or markets (*l*).

5. *Bequests of money secured on mortgage, &c.*] Money secured on mortgage, whether in fee or for a term of years, cannot be given to charitable uses either by a specific bequest or as part of the testator's general residuary personal estate; although Lord *Hardwicke* appears to have once intimated an opinion which has not been followed, in favour of a residuary

(*f*) *Paine* v. *Hall*, 18 Ves. 475. See *Gibbs* v. *Rumsey*, 2 Ves. & B. 299.

(*g*) *Shanley* v. *Baker*, 4 Ves. 732; *Attorney General* v. *Tomkins*, Ambl. 216; *Attorney General* v. *Tyndall*, 2 Eden, 207; *S. C.* Ambl. 614; *Hone* v. *Medcraft*, 1 Br. C. C. 261.

(*h*) *Attorney General* v. *Graves*, Ambl. 155—158, n. (3), by Blunt.

(*i*) *Attorney General* v. *Tomkins*, Ambl. 216; *White* v. *Evans*, 4 Ves. 21; *Pickering* v. *Lord Stamford*, 2 Ves. jun. 272, 581; *S. C.* 3 Ves. 332; *Paice* v. *Archbishop of Canterbury*, 14 Ves. 368; *Johnston* v. *Swann*, 3 Madd. 467.

(*k*) *Attorney General* v. *Graves*, Ambl. 155; *S. C.* 1 Coll. Jur. 448.

(*l*) *Negus* v. *Coulter*, Ambl. 367, and n. (2), by Blunt.

bequest including a mortgage (*m*). Thus where a mortgagee in fee, being in possession of lands under a judgment and writ of *habere facias possessionem*, made his will, and after reciting that he was possessed of certain sums of money due by mortgage and other specialties, gave the money in any wise due by mortgage, notes or otherwise, on the estate of the mortgagor, whereof he was possessed by *habere*, &c.; and all his personal estate in trust, to pay his debts, legacies, and funeral expenses; and afterwards, that the trustees should settle a place for the schooling and teaching so many poor boys, clothing them, &c., and to pay the master for such teaching the interest of the money he was possessed of by securities on the estate; and he devised to them all the money due on that estate, to be laid out at interest on good securities, to apply the interest thereof to the maintenance of the said school for ever: on an information to establish the charity, it was insisted by the relator, that the mortgaged premises were not devised, but only the money due by mortgage, and that the heir-at-law of the testator ought to be a trustee for the charity, the devise not being within the mortmain act, as it was only a devise of the beneficial, not of the legal interest which descended to the heir; the lands were alienable, and it was given in money and not as land.

Sir *John Strange*, M. R., said, "The distinction made on the part of the relator between a devise of mortgaged premises and of the money due on mortgage, did not seem well founded. By a gift of all one's mortgages to A. the whole beneficial right passes to him; and be the legal interest either in the heir or executor, as it is a mortgage in fee or term for years, each will be considered as trustee for A., who will be permitted by the court to use their names to get the money, or make the pledged estate his own by foreclosure. If it would be so in that case, then would it be equally so though the phrase used is *money due on mortgage;* where, unless the court construes it to pass the whole interest of the mortgagee, it will make it in effect a void devise, or at least put it in the power of a third person, whether the devisee

(*m*) *Vaughan* v *Farrer*, 2 Ves. sen. 182.

shall take thereby or not. Even if the whole legal interest did not pass by the devise to the trustees and their heirs, the heir at law was a trustee for them, and they were entitled to every right, the devisor had to compel payment of the money, or to make the estate their own by foreclosure. The mortmain act is not a total prohibition to give land or personal estate to be laid out in land, but only *sub modo;* and any variation therefrom is declared to be a public mischief. Then such a construction ought to be made by the court as is most effectual to repel the mischief and advance the remedy: therefore, if this devise tends to let in the mischief intended to be prevented, it is the duty of the court to guard against it taking effect. The only consideration for the court is, whether the gift in this case comes within the prohibition or not; and I am of opinion, that this devise comes within the express words and plain intent thereof. The design of the act was to lay a restraint on every method whereby land might possibly come to such hands, unless by the manner therein prescribed: the first part therefore is absolute, leaving, however, more liberty as to personal estate; but seeing that would not sufficiently answer the intent of the Legislature if confined to land, it adds a prohibition as to personal estate, that it should not be given to be laid out in the purchase of land. But was there no other way whereby the interest in land might come to a charitable use? Yes, money due on mortgage was a charge and incumbrance on land, the payment of which depended on the pleasure and ability of the mortgagor; therefore the Parliament has by express words taken in this by the third clause (*n*), the words of which, if they do not extend to the case of mortgages, I am at a loss to know for what purpose they were put in. The meaning was, that you shall not give to a charitable use, that which is, or may be a charge on land, though not so at the time of the gift. Suppose a sum of money is devised to be put out on a mortgage of freehold lands, is not this restrained by the act? If then a mere personal chattel may not, will it better the case, that

(*n*). *Ante*, pp. 119, 120.

at the time of the gift it is actually vested? and how absurd would it be in the Parliament otherwise? Though by the first clause securities for money are allowed to be given under the requisites of the act, yet the subsequent words of that clause afford an argument, that mortgages affecting lands actually at the time of the gift will not come within the meaning, as there may be other securities for money not immediate liens on lands, as debts, bonds, &c. I should think that on the first clause, mortgages are prohibited; but if doubtful on the first, the words of the other clause take it in expressly; and so on that latter clause chiefly I found my opinion, and it contains words not in the statute 11 & 12 Will. III. c. 4, for preventing growth of popery; and the cases show, the courts have made as liberal a construction to prevent the mischief as possible" (*o*).

In the *Attorney General* v. *Caldwell* (*p*), it was decided, that a general bequest of personal estate to charities was void, so far as it related to a mortgage for a term of years.

Where the property comprised in mortgages, and the principal money due thereon, were assigned by deed duly inrolled, to the master and fellows of a college, in trust for the rector of a parish for the time being, and the donor died within twelve months afterwards, it was held, that the gift was not set up by a will referring to the deed, and giving the advowson of the living *beneficially* to the college. For the will could not be connected with the deed so as to make the one operate upon the other by relation; but they stood singly, and then the deed being a gift not beneficially to the college, but to the college in trust for another object, which was not within the exception in the act in favour of colleges, necessarily fell to the ground, by the death of the grantor before the completion of the period assigned by the statute for giving full effect to such a donation (*q*).

(*o*) *Attorney General* v. *Meyrick*, 2 Ves. sen. 44. See 4 Br. C. C. 221.

(*p*) Ambl. 635; see also *Howse* v. *Chapman*, 4 Ves. 542; *Chapman* v. *Brown*, 6 Ves. 407; *Paice* v. *Archbishop of Canterbury*, 14 Ves. 368; *Pickering* v. *Lord Stamford*, 2 Ves. jun. 283, 556, 3 Ves. 332, 492.

(*q*) *Attorney General* v. *Munby*, 1 Mer. 327.

A mortgage of turnpike tolls is within the statute. Thus, where the governors of the charity for the relief of the poor widows and children of clergymen claimed a mortgage for 500*l.* upon the tolls arising under acts of Parliament 3 George I., c. 14, 10 George I. c. 6, 11 George II. c. 6, for the repair of the Brentford turnpike road; the security was taken upon the tolls simply, not including the toll-houses and gates: the Lord Chancellor said, "It occurred to me, that it had been determined that a mortgage of turnpike tolls is within the statute 9 George II. c. 36; the mortgagee would have a right to come into the Court of Chancery to have an account, and a receiver appointed; he would have a right, by the aid of that court, to have the tolls specifically applied to his mortgage. Consider what the point of law is from the nature of the interest; it is not at all within the mischief, but the consequences would open a much larger field for charitable donations; from the nature of the interest created by the act, these tolls, granted in perpetuity, are certainly a hereditament; it is in its nature an interest affecting land; he might bring an assize for these tolls. There is another species of toll which gives no right at all in the land, that is, a toll thorough." He thought the case fell within the general words of the statute (*q*).

Money secured by assignment of poor-rates and county-rates is within the mortmain act, and will not pass under a bequest to a charity; thus, where a testator bequeathed the residue of his personal estate to the treasurer of the Society for Promoting Christian Knowledge, and under a decree for taking an account of his personal estate, it appeared by the Master's report, that part of the personal estate was lent upon security of the poor-rates and county-rates, for building a gaol, under acts of Parliament giving authority to borrow money, and assign the rates for that purpose; Sir *William Grant*, M. R., said, "there is no solid distinction between money borrowed upon such a security as this, and money borrowed upon turnpike tolls; it is difficult to show, that a

(*q*) *Knapp* v. *Williams*, 4 Ves. 430 n.

charity, by taking money upon the latter security, takes any interest in land; those tolls are duties imposed by act of Parliament upon passengers in respect of their passage along the road; the right to collect those tolls gives no direct interest in the land itself, though an interest in duties arising in consequence of a passage along or through the land: the poor-rates are made payable by those who are occupiers of lands, tenements and hereditaments (*r*); if a man is not an occupier of lands, he pays nothing, unless he has other property, but if he has only land, he pays in respect of that. A very nice distinction was taken for the plaintiff, that the public make him contribute, as having the land, not on account of the use of the land; that distinction is not very perceptible. In the one case the public call for the duty, on account of the passage along the land, that it may be laid out for the purpose of public advantage, the repair of roads and facilitating communication; in the other, they actually burthen the lands, by burthening the occupier with the duty, for other public purposes of convenience and advantage. It is true they are not raised out of the land only, but by far the greatest part is raised out of the land; for the land pays so much rent in consequence of the occupier being liable to the poor-rates, otherwise the landlord would have more rent: so all that is paid in respect of the land, is got from the land as much as the rent arises out of the land itself; it is more properly to be said to arise out of the land because it is in respect of the occupation, than the tolls for the mere privilege of passing." As to that part of the poor-rates that is raised out of the personal property, it cannot be distinguished, nor the security apportioned by imputing so much to the produce of land, and so much from personal property, and, therefore, as under this security something real would go to the charity, the gift must fail altogether (*s*).

A bequest of bonds of the commissioners for the improvement of the city of *Bath*, bonds of the Corporation of *Bath*,

(*r*) Stat. 43 Eliz. c. 2. (*s*) *Finch* v. *Squire*, 10 Ves. 41.

and bonds of the commissioners of a turnpike, for a charitable purpose, was held void (*t*).

The shares in some navigations, as in the Avon and the New River, are considered as real estate, and therefore, cannot be bequeathed to a charitable use, but, when so given, will go to the heir-at-law (*u*). The shares in several other canals, railroads and similar undertakings, have been declared by private acts of Parliament to be personal estate, and transmissible as such, and not to be deemed of the nature of real estate, as in the *Macclesfield* Canal Act (*v*), and Gas Company (*w*), the *Thames* Tunnel (*x*), the *Southampton* Railway Company (*y*), the *Worcester* and *Birmingham* Navigation (*z*), and *Bridgewater* Gas Light Company (*a*), and many other companies. But it does not follow that such shares, which are connected with land, although declared to be personal estate, can be given by will to charitable uses.

It seems that the several instruments called bonds, given for securing on the parish-rates the payment of 100*l.* each and interest to the holder, by parishes enabled to borrow money by such means, under local paving acts, is not a mere chattel, but a charge on the owners of houses, &c., in respect of such houses, &c., and that a bequest of such instruments would come within the statute of mortmain (*b*).

A bequest of money to be laid out on real security is clearly within the act 9 Geo. II. c. 36, as where a testator directed a sum of money to be laid out in land, or some *real security*, as a maintenance for a schoolmaster: for the words *real security* can only be taken in their common acceptation; and in the Court of Chancery there is a known distinction established between government and *real securities*, the latter meaning mortgages or other incumbrances affecting land. The word

(*t*) *Howse* v. *Chapman*, 4 Ves. 544.

(*u*) *Buckeridge* v. *Ingram*, 2 Ves. jun. 652; see 1 Barn. & Cr. 205, 697.

(*v*) 7 Geo. IV. c. 30, s. 79.

(*w*) 7 Geo. IV. c. 8, s. 5.

(*x*) 5 Geo. IV. c. 156, s. 3.

(*y*) 4 & 5 Will. IV. c. 88, s. 128.

(*z*) 31 Geo. III. c. 59; *ex parte Horne*, 7 Barn. & Cr. 632.

(*a*) 4 Will. IV. c. 33, s. 15.

(*b*) *Rex* v. *Bates*, 3 Price, 341.

real is a term adopted in the law, and can never be understood in any other sense than *landed securities;* as, for instance, in the distinction which has been made between *real compositions* and moduses. *Real composition* does not mean any substantial permanent security for the payment of the composition, but land substituted in lieu of tithes, or a rent-charge issuing out of land. An information therefore for carrying the trust into effect was dismissed, as to the sum directed to be laid out on real security (*b*).

6. *Money given to exonerate lands in mortmain.*] A sum of money bequeathed to redeem a mortgage upon property, the equity of redemption of which is vested in trustees for a charity, is void. Thus where a testator directed the residue of his estate and effects to be disposed of, and the money arising from the sale to be paid to his trustees, to be by them invested in the public funds, or in some other good security, at their discretion, and the interest thereof to be paid to his wife for life, and at her decease he directed "that the sum of 500*l.* be paid to the trustees of the chapel in *Essex-street*, whereof the Rev. Mr. *Lindsay* and the Rev. Dr. *Disney* are ministers, to be applied by them towards the discharge of the mortgage on the said chapel." It appeared that the equity of redemption of the chapel had been vested in trustees, in fee, for the public worship and service of Almighty God therein, and had been conveyed to a mortgagee in fee for securing 1000*l.*, which sum was paid off and discharged in the life of the testator, and before the date and execution of his will, whereupon the chapel was re-conveyed to the trustees of it. The questions were, first, whether the legacy was void within the statute; secondly, if the legacy was not void by the statute, whether the express purpose of it having been satisfied by other means, that institution could have the benefit of it. It was held that, as the legacy was to be applied in the purchase of an interest in land, or a charge or incumbrance affecting the same, it came within the third section of the act, the

(*b*) *Attorney General* v. *Bowles*, 3 *post.* pp. 175, 176. Atk. 806; *S. C.* 2 Ves. sen. 547;

object of the legacy being for the purpose of procuring first, and then conveying to the trustees a further, greater, and more extensive interest than they had before. It was also held, that no intention, beyond that of securing the enjoyment of the chapel, could be collected; and that it could not be inferred that if the whole was not necessary for that purpose, that the surplus was to be applied for any other beneficial purpose in favour of the trustees of the chapel (*c*).

A bequest of a sum of money to pay off a debt secured by an equitable charge only upon a meeting-house, is void. Thus where a meeting-house and the land on which it was built had been paid for out of a fund raised by subscription; and by an indenture dated 18th May, 1807, the person of whom the land was purchased conveyed it to trustees, who were the subscribers of the fund, and who were thereby empowered to choose a treasurer, who was to receive all the seat-rents and other emoluments arising from the chapel, which were to be applied in paying the principal and interest of all monies due on the chapel and premises, and in keeping them in repair; and the trustees were also empowered, after the interest of the monies so due should have been paid, to allow all or any part of the surplus for the support of the preacher, and, if necessary, to mortgage the premises, till the debt contracted should be reduced as far as they should judge expedient.

A testatrix by her will, dated 23rd October, 1820, gave all her personal estate to trustees, upon trust (amongst other things) to pay thereout the sum of 400*l.* to the trustees or treasurer for the time being of the above mentioned Methodist meeting-house, to be applied, in the first place, for and towards the paying off and discharging any debt or sum or sums of money which might be due or owing upon the said meeting-house at the time of her decease; and the overplus, if any, to be applied to such other purposes of the said meeting-house as the trustees or treasurer for the time being should, in their

(*c*) *Corbyn* v. *French*, 4 Ves. 418. In this case it was argued, but denied by the court, that money given to disencumber land already in mortmain, was in principle the same as if it had been given to improve such land. See *post*. sect. iv. p. 188, &c.

discretion, see fit. At the death of the testatrix there was a debt of 439*l.* 12*s.* 7*d.* due upon the meeting-house to the subscribers, and that debt remained unpaid. The subscribers claimed to have a lien on the title deeds of the meeting-house, (which were in their possession,) and to be equitable mortgagees thereof, for the amounts of their respective subscriptions, but there was no other debt affecting the meeting-house. The bequest was held to be void, the Master having expressly found that there was a debt on the meeting-house, and there being no substantial difference between a legal and an equitable mortgage; if it were otherwise, a mortgage after a mortgage in fee, would not be within the statute; and the discretionary power given to the trustees to apply the legacy to other purposes connected with the chapel, could only arise in the event of there being no debt (*d*).

7. *Money charged on real estate.*] Charges on real estates, whether freehold, leasehold, or copyhold, in favour of charities, are void, by the express words of the statute (*e*).

A condition attached to a devise of real estate to pay a sum of money to a charity is clearly void; and it makes no difference if the sum be payable, in the first instance, to the executors, and be included in a residuary bequest of real and personal estate for the benefit of a charity; for although a testator may turn part of his realty into personalty, yet such conversion must be for lawful purposes, and the statute of mortmain makes void all charges, trusts, sums of money, &c. devised out of land to a charity (*f*).

The lien which a vendor has upon land for the amount of his purchase-money remaining unpaid, is an interest in land within this act; therefore where a testator, who had given his personal estate to charitable uses, contracted for the sale of a real estate which was not completed in his lifetime, it was held that the purchase-money did not pass by his will to the

(*d*) *Waterhouse* v. *Holmes*, 2 Sim. 162.

(*e*) *Attorney General* v. *Lord Weymouth*, Ambl. 24, 25; *Currie* v. *Pye*, 17 Ves. 462; *ante*, pp. 119, 120.

(*f*) *Arnold* v. *Chapman*, 1 Ves. sen. 110. See *post*. sect. vi. 1.

charity (*f*), although it had been otherwise decided in a previous case (*g*). It will also follow that a bequest of an equitable mortgage to charitable uses will be void.

The bequest of a residue of personal estate for charitable purposes was declared void, so far as the same consisted of mortgages and a particular debt due on a *judgment* to the testator, which was to be considered as an interest arising out of lands (*h*).

A legacy substituted for or added to another, is generally to be raised out of the same fund, and subject to the same conditions, as the original legacy (*i*). So where a testator by his will declared that his debts should come out of his *real estate* and *not* out of his personal estate, and gave the real to trustees charged with some charitable legacies, and one to each trustee, and by a codicil he removed one trustee and revoked his legacy, appointed another with the same legacy, and also revoked all the charitable legacies mentioned in the will, and gave a less legacy to one of the charities before mentioned, and other legacies to charitable institutions not named in the will, without specifying any fund out of which they were to be payable: it was held, that the charitable gifts were charged on the real estate, and therefore void (*j*).

8. *Money to arise by sale of real estate.*] Although the statute 9th Geo. II. c. 36, contains no express words prohibiting a bequest of money, to be produced by the sale of lands for charitable purposes, yet it is settled by construction that such a bequest is within the spirit and meaning of the law (*k*).

(*f*) *Harrison* v. *Harrison*, 1 Russ. & Mylne, 71.

(*g*) *Middleton* v. *Spicer*, 1 Br. C. C. 201.

(*h*) *Collison* v. *Pater and others*, Reg. lib. (A) 1830, fol. 1817—1819.

(*i*) *Crowder* v. *Clowes*, 2 Ves. jun. 449. So where the duty on a legacy given by will was directed to be paid by the executors, it was held that a legacy substituted by a codicil was exempted from the duty. *Cooper* v. *Day*, 3 Mer. 156.

(*j*) *Leacroft* v. *Maynard*, 1 Ves. jun. 279; *S. C.* 3 Br. C. C. 233.

(*k*) *Mogg* v. *Hodges*, 2 Ves. sen. 52; *Attorney General* v. *Lord Weymouth*, Ambl. 20. See *Waite* v. *Webb*, 6 Madd. 71.

Thus where a testator devised all his real estates to his executors, in trust, to sell, and after payment of certain legacies bequeathed the money to arise by the sale of his real estate, and the intermediate rents and all his personal estate to his executors, in trust, to pay one moiety to the governors of *Bethlehem Hospital*, for the support and benefit of incurable lunatics, and the other half to the treasurers of *St. George's Hospital*, to be applied in carrying on the designs of that hospital. On an information, praying that the testator's estate might be sold and the money with the intermediate profits applied according to the will, to which the testator's heir pleaded the statute 9th Geo. II. c. 36, the case was held to be clearly within that act, which prevents both the conveyance of lands and the charging of lands for charitable purposes. The will in question was in effect a devise of the lands themselves, and a gift of the produce of them, for as it contained a gift of the rents and profits the trustees could not have been compelled to sell, if they had paid the other charges upon it, but might have retained the estate; but even if only considered as a devise of the money, the residuary legatee might have elected to take the estate instead of the money. A charge on real estate for a charity being clearly void by the words of the act, it would have been absurd to hold that a testator should be able to give his whole real estate to be turned into money for the benefit of a charity (*l*).

Legacies to the poor of two parishes, to be paid out of monies to arise from the sale of estates devised to trustees upon trust to sell, were held to be void within the act (*m*).

So, where a testator being entitled to several sums of money, directed to be raised out of the produce of lands vested in trustees for sale, by his will directed his trustees and executors to convert all his property into ready money, and after payment of his debts, legacies, &c., to pay the residue to his wife. The wife having survived her husband, disposed of the residue of her personal estate after payment of her debts and legacies, "to hospitals, schools and charitable institutions, for the benefit of society, 100*l.* each, as far

(*l*) *Attorney General* v. *Lord Weymouth*, Ambl. 20.

(*m*) *Page* v. *Leapingwell*, 18 Ves. 463.

as it would go." The lands charged, were neither sold nor contracted to be sold, until after the death of the wife, when the sums were paid by the executors of the husband, who received them from the trustees for sale, to the executrix of the wife: Sir *J. Leach*, V. C., said, "The object of the stat. 9th George II. c. 36, as its title imports, was to prevent land becoming inalienable; but in order to secure that object, the Legislature thought it prudent, not only to prohibit gifts of lands to charitable uses, but to prohibit gifts to charitable uses of any interest in land; being aware, that by circuity and election, the land itself might be acquired in most cases, as the result of an interest in land. That money to arise from the sale of land is an interest in land, admits of no doubt; and it is plain, therefore, that the *husband* could not by his will, have devoted these sums to charitable purposes; at the death of the *wife* these sums were not raised, and the interest in the land continued; and if her will is to carry those sums to charitable uses, it must of necessity pass to such uses, an interest in land; it can make no difference, that the wife had not the immediate personal right to call in these sums; she took the property in these sums, and the other personal estate of her husband, subject to his debts and the charges of his will, and the executors were but trustees for her; and the statute of mortmain must equally apply, whether the interest in land, which subsisted at the wife's death, was in her immediate personal demand, or that of her trustees" (*n*).

The produce of real estate cannot be given to what, in contemplation of the English law, is for a charitable purpose, although that purpose is to be carried into execution in another country. Where a testator directed the income of a trust fund, arising from the produce of real estate, to be laid out as his trustees might think proper and direct for the advancement of learning, in any of the universities or public seminaries in *Great Britain* or *Ireland*, leaving the choice and distribution entirely to the discretion and good sense of his trustees; recommending to their consideration a plan he should leave for the maintaining of students at the *King's*

(*n*) *Attorney General* v. *Harley*, 5 Madd. 321.

College of *Old Aberdeen*, but without meaning to lay his trustees under any restraint in the exercise of their own judgment, farther than that the income of his estate be employed for the advancement of learning in these kingdoms.

By a codicil reciting the trust declared by the will, as to the residue of his estate, the testator directed, that the trustees should lay out and employ the trust monies from time to time in the purchase of freehold lands and tenements in Great Britain, or in the public funds, or in other proper securities in Great Britain at interest. The codicil then gave directions for application of the income of the trust fund in an establishment for students in the *King's College* of *Old Aberdeen* in North Britain, in a further payment not exceeding 80*l. per annum*, to the general use of the college; and any surplus that might arise, to be employed by the trustees at their discretion, for the promoting of learning in any of the seminaries of *Great Britain* or *Ireland*. Sir *W. Grant*, M. R., said, "It was clear that no charity in *England*, not within the exception of the statute, could have derived any benefit from the produce of the real estate. The question then is, whether such produce may be given for what, in contemplation of the English law, is for a charitable purpose, when that purpose is to be carried into execution in another country. The validity of every disposition of real estate must depend upon the law of the country in which that estate is situated. The subject of this statute is real estate in *England*. The owners of such property are disabled from disposing of it to any charitable use, except by deed executed twelve months before the death of the owner, &c., to take effect from the execution. The words are perfectly general; 'any charitable use whatsoever:' and the object could not be to treat English charities less favourably than charities to take effect for the benefit of other countries. It would be somewhat incongruous to refuse to permit such a disposition for the most laudable and meritorious charitable institution in *England*; but if the party chose to carry his benevolent intention beyond *England*, to permit him to do so, to the effect of disinheriting his heir in his last moments. The disinheriting

of the lawful heirs by languishing or dying persons, which is treated by the statute as a mischief, cannot be less so, when the effect is to carry the property out of *England.*

"Therefore, neither the words of this statute, nor the presumable intention, warrant me in declaring that it is to be confined to charitable purposes, to be carried into execution in *England.* The statute not containing an exception in favour of the universities of *Scotland* as it does with regard to the universities of *England;* this must be considered as a charitable disposition, by which, nothing that is the produce of the testator's real estate can pass" (*o*).

SECTION IV.

Of Bequests of Money to be laid out in the Purchase or Improvement of Real Estate for Charitable Uses.

1. *Of Imperative Trusts to Invest in Lands.*
2. *How far a Testator's Intention may be Effected by Hiring Land, or by a Gift from others,* p. 178.
3. *When a Discretionary Power to Invest in Lands or in the Funds will Support the Gift, and when not,* p. 182.
4. *When Bequests to Improve Lands in Mortmain are Valid, and when not,* p. 188.

1. *Of imperative trusts to invest in lands.*] THE statute 9 Geo. II. c. 36, s. 1, having expressly provided, that no money or other personal estate shall be given to be laid out in the purchase of lands for charitable uses, unless by deed inrolled as prescribed by that act (*p*); it follows as a necessary consequence, that all *bequests* of money for those purposes are void. The decisions upon this part of the subject

(*o*) *Curtis* v. *Hutton,* 14 Ves. 537. 1 Br. C. C. 271. See *Campbell* v. *the Earl of Radnor,* (*p*) See *ante,* pp. 118, 119.

turn principally upon what expressions amount to a positive trust to invest in the purchase of lands.

If the primary destination of the fund be the purchase of land, and no discretion be given to the trustees to invest it in any other mode, the gift will be void, as where a testatrix gave the sum of 600*l.* to be laid out in the purchase of freehold or copyhold lands as soon as could be after her decease; and until an *eligible* purchase could be made, she directed that the 600*l.* should be laid out at interest by the trustee, his executors, or administrators, whom the testatrix appointed trustees for the purpose of receiving and placing out the same for the most interest he could safely get, until a purchase could be made, and for making such purchase and upon further trust, that as soon as the trustee could meet with such freehold or copyhold lands suitable for the purpose, that he should purchase the same and convey it to the trustees of a chapel, and the interest of the money and rents of the lands were to be applied for the benefit of the preachers. Upon the question whether the gift could be sustained in respect that the fund might be laid out otherwise than in land, Lord Commissioner *Eyre* said, "that the case of *Grimmett* v. *Grimmett* (*q*) which was cited, rested upon a critical comparison of words, the words in that case being 'such purchase as is to the *satisfaction* of the trustees.' If the question could be rested upon the similarity or synonymy of the two cases, it would be a fair argument; but I think, without saying whether I approve of that case or not, that this is substantially distinguishable, and upon the ground stated by Lord *Hardwicke* there; for he says, 'if it had been a disposition of money to be laid out in land, he should have been obliged to have said it was within the statute.' Now this is that very case, therefore the case cited will not apply, and it stands upon so much nicety, that it is not proper to extend it to cases in which every part of the circumstances of that case does not occur. This devise therefore is void within the statute of mortmain" (*r*).

(*q*) Ambl. 210; *post.* pp.184—186. *S. C.* 1 Ves. jun. 548; 4 Br. C. C.
(*r*) *Grieves* v. *Case*, 2 Cox, 301; 67; See *post.* sect. v.

So where a testatrix devised all her real estates to be sold, and directed part of the money to be laid out in the purchase of a competent piece of ground for erecting and building an almshouse in a particular parish, and the other part in the building, erecting, and furnishing the said almshouses. The testatrix willed, that the whole of the monies to be laid out in purchasing the ground and erecting such almshouses should not exceed 1400*l.*, and the residue of the money arising by such sale, and all other monies she should die possessed of, should be laid out in the purchase of lands in the names of trustees, in trust out of the rents and profits to pay certain weekly stipends to twenty poor persons whom she had appointed to live in the almshouses. The whole devise having been declared void except as to the personal estate, it had been ordered by Sir *Thomas Clarke*, M. R., that two years should be allowed the said trustees for procuring if they could, a gift of a piece of land whereon to build the almshouses according to the will. But Lord *Northington* reversed that decree, because building on a site was contrary to the act; secondly, because it was contrary to the intention of the testatrix, who intended her charity to be entire and not confounded with that of another, to make her go begging for ground (*s*). His Lordship subsequently explained (*t*), that the foundation of his opinion in that case was, that the testatrix directed the land to be *bought*, and therefore, that he should have been disappointing her intention if he had given liberty to erect an almshouse in case any body would have given the land.

Again; where a testator gave the residue of his personal estate "to be a perpetual endowment or maintenance for two schools mentioned in the will, and appointed two persons and the survivor of them, and the rectors for the time being in which the schools were, and their successors for ever, patrons of such schools," with certain directions as to their conduct, and afterwards proceeded in these words:—"And I *recommend* (*u*) that

(*s*) *Attorney General* v. *Tyndall*, 2 Eden, 207; *S. C.* Ambl. 614.

(*t*) Ambl. 555, 616.

(*u*) See *ante*, pp. 141, 142.

at a convenient time, my money shall be collected together and laid out in the purchase of a freehold messuage and tenement, or lands which are freehold, to be a perpetual endowment for the two schools by an equal portion to each of the schoolmasters in every year, after all incidental expenses are paid; provided and my will is, that my estate and effects so vested in trust, shall be suffered to accumulate until the annual proceeds shall amount to 100*l. per annum*, for each schoolmaster, and then the net annual proceeds shall be applied for the endowment of the said two schools as aforesaid." The next of kin of the testator filed a bill to obtain a declaration by the court, that the bequest was void, and for an account and distribution; Chief Baron *Richards* said, the whole question arises upon the construction of the words of the second clause of the will, depending on whether they are mandatory upon the trustees, so that they must in all events lay out the money given in the land, or whether they may not so lay it out, if they should not think it advisable. If they are obliged so to lay out the money, the bequest would be void certainly; if on the other hand an option has been given to the executors, it is hardly necessary to say that they may legally give effect to the bequest. The Chief Baron held, that the will did not contain any express words giving a discretion to the trustees, and therefore that the bequest of the residue was void, and belonged to the next of kin of the testator (*v*).

A bequest of money to the Corporation of *Queen Anne's Bounty* was held void, because they are bound by their rules to lay out the money in land; and though the crown has power to make new rules, the gift could not be supported, because it must be regulated by the rules existing at the time of the testator's death (*w*). For the same reason a bequest to the society for increasing "clergymen's livings in *England* and *Wales*, for the perpetual purpose of increasing their livings," was declared void, there being no other so-

(*v*) *Kirkbank* v. *Hudson*, 7 Price, 212; *S. C.* 1 Dan. 259.

(*w*) *Widmore* v. *Woodroffe*, Ambl. 636; *S. C.* Dick. 392; 1 Br. C. C. 13 n.; but such a bequest would now be good. See 43 Geo. III. c. 107; *ante*, pp. 51, 52.

ciety answering that description but that of the governors of *Queen Anne's Bounty* (*x*).

The intention of a testator to give to his trustees power to lay out the residue of his personal estate in the purchase of lands either in *Scotland* or *England*, for a charity, may be good; and it is perfectly clear that it is not necessary that the testator should express in positive and distinct terms, that the trustees were to have such option. If it can be collected from any part of the will, that the testator meant or contemplated that his trustees should have an option of buying lands and rents of inheritance either in *Scotland* or in *England*, such intention will be carried into effect. But where a Scotchman by a will in the English form made in England, gave the residue of his personal estate to trustees, of whom some, but not all, were resident in Scotland, upon trust to lay out the same in the purchase of lands or rents of inheritance in fee simple for the charitable purposes expressed in an instrument of even date with his will; and by such instrument, he directed the trustees of his will to pay the rents annually to certain other trustees, who at all times were to be persons residing within twenty miles of *Montrose*, to be by them applied to the relief of indigent ladies in *Montrose*, or within twenty miles of that town; it was held, that the bequest was void under the mortmain act, as there was not enough in the will taken altogether to show that the testator contemplated the purchase of lands in *Scotland* (*y*). On appeal to the House of Lords, Lord *Lyndhurst* said "the question was, whether there was an option given in the will to purchase real property in *Scotland?* Had it appeared in distinct terms, or by clear implication upon the face of the will, that the trustees were to lay out the money in the purchase of real estate in *England* or *Scotland*, as they might think fit; there would have been no objection to the bequest; but upon the best consideration of the will and the argument, he could see nothing to lead him satisfactorily to the conclusion, that the testator contem-

(*x*) *Middleton* v. *Clitherow*, 3 Ves. 734.

(*y*) *Attorney General* v. *Mill*, 3 Russ. 328.

plated the laying out of the money in the purchase of real property in *Scotland*. Unless there was something leading safely to the conclusion that the testator intended to give them authority to lay out the money in the purchase of real property in *Scotland*, it would come within the ordinary case of a direction by a testator to his trustees or executors, to lay out money in the purchase of real property generally, to be applied to charitable purposes; which, whether the charitable objects be in *England* or *Scotland*, would be a void bequest. As there was not sufficient to lead safely to the conclusion that the testator had *Scotland* in contemplation in the purchase of estates, though the rents of the estates when purchased were to be applied through the medium of other trustees to certain charitable purposes in that country; the judgment of the court below was affirmed without costs (*z*).

It was formerly held, that a bequest of personal estate to *erect* a school or hospital, did not amount to a direction to build, but imported foundation, and the maintenance of the objects of the charity, in which sense it was construed, as well in charters from the crown, as in private foundations. Thus where a will contained a gift of the residue of the testator's estate to trustees, "in order to and towards erecting a school for the education of poor boys in such a place, and in such a manner as the trustees should direct and appoint;" Lord *Hardwicke* established the charity, on the ground that the erecting included the founding, and consequently the maintenance of the master, which was a different thing from the mere school-place itself; and that the end might be obtained by hiring a house, which was accordingly directed for ever (*a*). So where the residue of real and personal estate was given to trustees to *erect* in some convenient place in or near the City of *York*, an hospital for the support and maintenance of as many poor old men as the surplus of the testator's estate and effects would admit of, and to put in as many as the trustees should think proper in their dis-

(*z*) *Attorney General* v. *Mill*, 5 Bligh, N. S. 593; *S. C.* 2 Dow & Clark, 393.

(*a*) *Cantwell* v. *Baker*, 2 Ves. sen. 185. See *post*. pp. 178—182.

cretion; Lord *Hardwicke* held, that there was no direction in the will to lay out any part of the money in building an hospital, for *erect* as well imported foundation as building, and the word *erigimus* was so construed, as well in charters of the crown as in private foundations. His lordship said, that before the statute of mortmain, the court would have had a discretion in laying out the fund, either in land or personal securities; and as the will contained no direction for laying out in land, it ought to be invested in the funds, for there was nothing in the statute prohibiting the giving of personal estate to charity, provided it was not to be laid out in land (*b*).

It is now perfectly well settled, that if a testator gives personal property to erect and endow a school or hospital, it must be considered (unless it be otherwise declared) that it is his intention that land should be acquired and buildings made as necessary parts of his purpose, and consequently such a gift is void (*c*).

Thus where a testatrix gave the residue of her estate to trustees, upon trust, that they or the major part of them should, as soon as conveniently might be after her decease, *cause to be erected and built*, within a certain part of a parish, such a dwelling-house as her trustees should see proper and expedient; which, when built, was to be appropriated by them for the use of a schoolhouse, for the purpose of educating, clothing and maintaining such a number of poor parishioners within the parish, as her trustees should see proper; and find the interest, produce and profits of her said real and

(*b*) *Vaughan* v. *Farrer*, 2 Ves. sen. 182.

(*c*) *Attorney General* v. *Nash*, 3 Br. C. C. 588; *Henshaw* v. *Atkinson*, 3 Madd. 312; *Attorney General* v. *Hyde*, Ambl. 751; *S. C.* 1 Br. C. C. 444.—Lord *Eldon* agreed with the late cases, which go a great way to establish that the court cannot put such a construction upon the word "erect" as was put upon that word in former cases; and that *primâ facie* the testator must be taken to mean by that word that land shall be bought. His lordship thought good sense was with the late cases, requiring that the testator himself should have manifested his purpose to be sufficiently answered if the trustees could hire or beg land, according to the expressions in different cases. *Attorney General* v. *Parsons*, 8 Ves. 191; *Henshaw* v. *Atkinson*, 3 Madd. 306; *Johnston* v. *Swann*, 3 Madd. 457.

personal estates and effects sufficient to maintain, and gave several directions for the government of the said school; and concluded by *directing and empowering her said trustees*, out of her real and personal estate, *to purchase* such a spot of ground within the parish as they should see proper, for the purpose of erecting the school upon. A demurrer, that the legacies were void in law, to a bill praying an account of the testator's property, and that the charity might be carried into effect, was allowed, although the relators had purchased with their own money a spot of ground of the description mentioned in the will, which had been conveyed to them, and which, by the bill, they offered to give and appropriate to the charity (*d*).

It is a settled rule of construction, that a direction to *build* is to be considered as including a direction to purchase land for the purpose of building, unless the testator distinctly point to some land already in mortmain (*e*).

A testator by will, dated May, 1745, gave 500*l.* out of his personal estate to trustees, upon trust, to lay out part thereof in building a small schoolhouse in the village of *Newchurch*, with a little house adjoining for a schoolmaster; and thereby directed that the purchase of the ground and expenses of building should not exceed 200*l.*, and the remaining 300*l.* he directed should be laid out in land, *or some real security*, to be a maintenance for the master; all which he appointed to be done with the advice of the proprietor of *Longridge*, and the vicar and churchwardens of *Newchurch*, for the time being, or any two of them.

Lord *Hardwicke* said, with regard to the 200*l.* there is no doubt the testator's intention was to dispose of it in the purchase of ground, and to build upon it a house for a schoolmaster. If there had been any land in this parish appropriated to any other charity, and the schoolhouse had been permitted to be built there, that would have effectually answered the intention of the testator. Such a devise as this is certainly

(*d*) *Attorney General* v. *Nash*, 3 Br. C. C. 588.

(*e*) *Attorney General* v. *Hyde*, Ambl. 751; see *post.* p. 192; *Attorney General* v. *Davies*, 9 Ves. 544; *Pritchard* v. *Arbouin*, 3 Russ. 456.

contrary to that clause in the act of Parliament which does as well restrain the giving personal estate *to be laid out in land*, as the devise of the land itself. The court declared that the 200*l.* could not be laid out lawfully in the purchase of lands, but that the same might be lawfully laid out in building a schoolhouse upon any lands in the village of *Newchurch*, which then did or might belong to that parish; and the trustees were to be at liberty to lay proposals before the court for that purpose (*f*).

This case is said to have been directly overruled by Lord *Northington*, in a case where the testator directed his executors to *build* and endow an hospital for poor persons, on the south side of a church-yard, or at such other place as he should by writing under his hand appoint, in case he should not have done it during his life, for which purpose he charged his personal estate with the sum of 2000*l.*, which was held to be void (*g*). Sir *R. P. Arden*, M. R., said (*h*), that he could not concur in that part of the *Attorney General* v. *Bowles* where, admitting that a testator's object was to erect a building upon land not then given, Lord *Hardwicke* threw out, "that if land should be afterwards given, the statute would "not be evaded by applying the money to erect a building "upon it;" for such an application is giving land in mortmain, being another mode of purchase, and holding out a temptation to people to give land.

Where a testator used these words—"I give the sum of 5000*l.*, more or less, as it may be wanted, to build 12 almshouses, purchase the ground, six for poor men, six for poor women, economy and convenience observed in the structure;" it was held, that the bequest was clearly void, for the testator gave the money expressly to purchase land; and even if he had said nothing about purchasing, a bequest of money to build almshouses would be void, according

(*f*) *Attorney General* v. *Bowles*, 3 Atk. 806; *S. C.* 2 Ves. sen. 547; *ante*, pp. 160, 161. See 2 Eden, 212, and note (b).

(*g*) *Pelham* v. *Anderson*, 2 Eden, 296; *S. C.* cited 1 Br. C. C. 444. See 6 Ves. 408.

(*h*) *Attorney General* v. *Whitchurch*, 3 Ves. 141.

to the later determinations; as the court will not imply an intention of which the will affords no trace, that if the land should be given, then, and then only, the building should take place; and if the original intention be a purchase, an offer to give will not cure it; for in the *Attorney General* v. *Nash* (*j*), the trustees had purchased land with their own money, and they offered to give that land, yet the court refused to give it effect (*k*).

Where a testator by his will offers to trustees of another charity, not holding any land in mortmain, the residue of his personal estate, as a consideration for their furnishing land for the erection of almshouses, and taking the management of them, and does not mean to give any part of the residue to them, unless they supply the ground for the almshouses, it is in fact, a laying out in land, being money offered if land is given in return.

Thus where a testator by his will, dated February, 1801, after giving the sum of 5000*l.* more or less, as might be wanted, for building almshouses for 12 poor persons, and other legacies, proceeded thus—"After the foregoing bequests are discharged, and anything further that may occur of that sort, I give all the remainder of my property for the use of the Orphan School in the *City Road*, under the direction of the committee of that school for the time being, provided they will furnish a piece of ground near the school to build the aforesaid houses on; and the committee to take the management of them and all my affairs, which is not great; and if it is not agreeable or convenient for them to do so, I request the following to accept of the trouble of fulfilling my desire in this will [*naming them*]; that the above gentlemen procure a piece of freehold ground for the purpose of building the almshouses, and erecting a school for the education and clothing only of as many children as the finances will bear; but if the Orphan School committee accepts of the plan, that they will afford the same medical assistance

(*j*) 3 Bro. C. C. 588. See *post.* p. 180.

(*k*) *Attorney General* v. *Davies*, 9 Ves. 535, 541, 544.

to the almshouses, as to the school." Upon an information for carrying the trusts of the will into execution, the committee of the orphan hospital thereby offering to give the ground, the next of kin insisted, that the bequest of 5000*l.*, and of the residue for the charitable foundation, was void.

Sir *W. Grant*, M. R., held, that it was a bequest of a residue to be laid out in land, from which two consequences followed—first, that such bequest was void; secondly, that the bequest for erecting almshouses was void, because they were to be erected only by what he considered a purchase of land. He said, "It may be, if the whole scheme might be carried into effect, that the Orphan School might have a benefit, for there might be a surplus; and only what was equivalent to the land for the almshouses, was to be applied. But it was impossible to make an apportionment, and to declare the bequest of the residue void for part, and good for the rest; the testator's wish was to connect the almshouses and the Orphan School, and to benefit the latter, because of the benefit he expected from the school; it was only on account of their contributing to his plan that he gave to them; the bequest of the residue was, therefore, held wholly void." This decree was afterwards affirmed by Lord *Eldon*, who considered the school to be a voluntary society, and if they happened to have land which they could furnish, it was not at that time in mortmain in the sense of the statute (*l*).

A bequest of a sum of stock to be laid out, when an opportunity offered, in building a chapel for the New Church (meaning a church for worship according to the doctrines of Baron *Swedenborg*), and to contribute the same towards its building and support, was declared to be void (*m*).

2. *How far a testator's intention may be effected by hiring land, or by a gift from others.*] It appears to have been decided by Lord *Hardwicke*, where money was given towards erecting

(*l*) *Attorney General* v. *Davies*, 9 Ves. 535, 545. See *Attorney General* v. *Day*, 1 Ves. sen. 218; *ante*, p. 135.

(*m*) *Pritchard* v. *Arbouin*, 3 Russ. 456.

a school, that the end might be obtained by hiring a house, which was directed for ever (*n*); and, in another case, where the residue of personal estate was given for erecting an hospital (which the same learned judge construed founding), he said, although the trustees could not, under the direction of the court, invest in the purchase of land, yet that the trust might be executed by *hiring* a house, or by building by permission on land already in mortmain (*o*). So a bequest of the dividends of stock, to stand for ever in a trustee's name, if it could be done, otherwise to be transferred to trustees for establishing a school in a particular parish, appears to have been held good, on the ground that the master might teach in his own house or in the church (*p*).

But it has since been determined, that a direction to take a lease for the purposes of the charity will render the gift void. Thus where a testator gave all his real and personal estate to trustees, with directions, that as soon as conveniently might be after his decease, a commodious and proper house should be taken by them in *Bridgewater* upon lease, at such yearly rent as should be agreed upon, or otherwise, as they should think fit, as a school; and that the children and grandchildren of his relations (whom he named) should be placed there for their education at the age of seven years and till fourteen, then to be placed out apprentices with a suitable fee. He also directed that such other boys and girls should be placed at the same school as the trustees should think fit, the boys to be in a double proportion to the girls; that this foundation should be under the visitation of the mayor of *Bridgewater*, and that there should be an inscription of the founder's name and benefactions over the door. The heir and next of kin claimed in opposition to this trust, under the statute of mortmain. The Lord Chancellor held, that the testator intended to make a permanent establishment, either by purchase or taking a lease, and that hiring a house at will

(*n*) *Cantwell* v. *Baker*, cited 2 Ves. sen. 185.

(*o*) *Vaughan* v. *Farrer*, 2 Ves. sen. 189. See 9 Ves. 542.

(*p*) *Attorney General* v. *Williams*, 4 Br. C. C. 526; *S. C.* 2 Cox, 387. See *post*. p. 182.

would not have been a good execution of the trust; and, therefore, that the disposition, as far as it went to establish a charity for general purposes, was void by the statute; but the gift was held good, so far as it provided for the education of the children and grandchildren of any of the stocks named in the will who were in existence at the testator's death, who did not come within the rule against perpetuities, with liberty for other children to go whilst the school should be kept open (*q*).

Where the testatrix's intention was that part of the fund, if necessary, should be laid out in land, Lord *Thurlow* expressed an opinion, as her general desire was that the charity should be executed, that her intention would not be defeated if land were acquired by other means; and that if land were given, no part of the bequest could be withheld from the maintenance of the charity; but Lord *Eldon* said, with reference to that case, that he knew Lord *Thurlow's* opinion was where a testator directs a school to be built, and does not himself advert in his will that the land is to be acquired otherwise than by purchase, it will be inferred that his intention was that it should be acquired by purchase, and then the bequest is void (*r*); and, in a subsequent case it was said, that if the testator's original intention be that land should be purchased, an offer to give land will not remove the objection (*s*).

Where a testator directed his executors, "with all convenient speed, to lay out and invest the sum of 7100*l.* (part of his personal estate) in government funds or securities, in the names of the minister for the time being of the parish of *Brighthelmstone*, and such three other inhabitants of the said parish as to his executors should appear to be substantial and respectable persons, to hold as trustees for the purposes thereinafter mentioned; and the testator directed the minister and other trustees, in concurrence with the churchwardens and

(*q*) *Blandford* v. *Thackerell*, 2 Ves. jun. 238; *S. C.* 4 Br. C. C. 394.

(*r*) *Attorney General* v. *Nash*, 3 Br. C. C. 588, 595 n. by Belt, cited by Lord *Eldon*, 8 Ves. 191. See *ante*, pp. 176, 177.

(*s*) *Attorney General* v. *Davies*, 9 Ves. 535, 541, 544. See *ante*, p. 177.

overseers of the parish for the time being, from time to time to pay, apply and dispose of the interest and dividends of such funds or securities in manner following, that is to say—first, in paying the expenses of providing a proper school-house for the instructing of twenty poor girls of the parish in needle-work, reading and writing; such expense of providing a school not to exceed the annual interest and dividends of so much or such part of the stocks or funds wherein the said 7100*l.* should be invested, as at the time of such investment should be of the value of 600*l.* of lawful money of Great Britain; and gave other particular directions as to the management of the school and the interest and dividends of the funds." Sir *J. Leach*, V.C., said, with respect to the school, the single question is whether, to execute the expressed purpose of the testator, land must be purchased for erecting a school. The testator has directed only, that a proper school-house should be provided, which may be by hire; and it is some evidence of his intent that land should not be bought, that the trustees are only to apply the dividends, and no part of the principal, to the expense of providing a school-house. It is said he meant the charity to continue for ever; but this intent may be executed without necessity for the purchase of land (*t*).

Sir *L. Shadwell*, V. C., said, that the previous authorities were not affected by the above decision, because the testator had directed the interest of so much only of the larger fund, (which he directed to be applied for charitable purposes) as should not exceed 600*l.* to be applied for providing the school-house. It was perfectly obvious, therefore, that such direction never could be meant to be a direction to build, for there could only be an annual sum of 18*l.* applied; in point of fact it was only the interest of so much of the fund as should not exceed 600*l.* that was applicable to providing the school-house (*u*).

It seems that where a will contains no direction to acquire land, that a gift for charitable purposes may be good, although an expectation is expressed by the testator that lands will be

(*t*) *Johnston* v. *Swann*, 3 Madd. 457. (*u*) *Giblett* v. *Hobson*, 5 Sim. 661.

supplied by others, for carrying the objects of his bequest into execution; and where it was objected that the testator's intention was that bequests of sums of money for charities were not to take effect until lands or buildings were supplied by others, and that the money might be locked up for an indefinite period of time, and therefore that the bequest could not be sustained, Sir *J. Leach*, V. C., said (*v*), although the point was not then decided, that the cases of *Downing College* (*w*) and the *Attorney General* v. *Bishop of Chester* (*x*), seemed to be authorities against such an objection.

Where a testator directed the dividends of certain sums in the public funds to be applied for or towards *establishing a school* in a parish named in his will, and he afterwards declared his meaning to be that the schoolmaster should not have a less salary than 30*l. per annum*, and that the overplus of the dividends should be applied in buying *books, fire, clothes* and other necessaries for the children, and in placing them out as apprentices, but no part of the dividends to be applied for victuals, drink, or *lodging*, for the said scholars. There not appearing to be any school in existence, the court thought that under such a bequest, even before the statute of mortmain, that it would have been excluded from applying any part of the fund in purchasing land or building, and bound to apply the funds in the supply of the particular articles mentioned, whenever the school should be established; and a decree was made for executing the charity, and for the Master to consider a scheme which should not include the application of any part of the dividends to the purchasing or renting land (*y*).

The authorities may perhaps warrant the conclusion that a bequest to build upon land to be given by others for the purposes of the particular charity specified by the testator, will be valid, provided land be afterwards legally acquired for the

(*v*) *Henshaw* v. *Atkinson*, 3 Madd. 313. See *post*. 187, 188.

(*w*) Dick. 414; *S. C.* Wilmot's Notes, 1; *ante*, p. 140.

(*x*) 1 Br. C. C. 444.

(*y*) *Attorney General* v. *Williams*, 2 Cox, 387; *S. C.* 4 Br. C. C. 526.

purpose; but, in the absence of an express declaration upon the subject, it will be inferred that it was the testator's intention that land should be bought by his trustees, and not that it should be supplied by others, in which case the gift will be void.

3. *When a discretionary power to invest in lands or in the funds will support a gift, and when not.*] Although a positive trust, directing money to be laid out in the purchase of lands for charitable uses is void, yet if there be sufficient room for the court to say that a *discretionary* power is given to the trustees to lay out the money either in the funds or in lands, the gift will be sustained; for where a testator has pointed out two modes, the one consistent with the statute, the other inconsistent with it, the court will adopt that which is legal and carry it into effect; but it is necessary in all these cases to see whether the testator has given such an option, and whether there is an ultimate object *consistent* with the statute or not (*z*).

Thus where a testator made his will, dated in 1738, in these words: "I will and desire that my executors, within twelve months after my decease, do settle and secure, by purchase of lands of inheritance, *or otherwise as they shall be advised*, out of my personal estate, one annuity or yearly payment of 50*l.* to be paid yearly and distributed for ever by my executors, their heirs and assigns, among the poor and indigent people of *Leeke*, in the county of *Stafford*, in such manner as they shall think fit; and my will also is, that my executors do also settle and secure one other annuity of 5*l.* to be paid yearly to the vicar of *Leeke*, for the time being, for ever, for preaching an annual sermon on every 12th day of October." Lord *Hardwicke* held, that the first words in the will came within the prohibition of the statute 9 Geo. II, c. 36, as the testator directed his executors "to settle and assure, by purchase of lands of inheritance," &c., and if the testator had rested upon those words, his devise would have been clearly

(*z*) See *Attorney General* v. *Whitchurch*, 3 Ves. 144; Ambl. 212.

void; but then he went on in the disjunctive, "or otherwise, as my executors shall be advised;" and if a devise in a will is in the disjunctive, and leaves to the executors two methods of doing a particular thing, the one lawful and the other prohibited by law, the court will not, because one method is unlawful, hold the other to be so, but will give effect to the lawful mode, and hold the bequest to be good. In this case it was argued that the words "for ever," in the bequest, showed that the annuities must arise out of some real estate, which was only capable of supplying them for ever, for personal funds were too perishable and transitory in their nature to answer such everlasting annuities; and that if a particular sum were vested in stock, with the design to purchase a particular yearly sum or annuity, it might so happen that the company might be quite dissolved, or that the stock might fall, or the interest be so reduced that half the annuity might not be produced; but the court overruled those objections, for if the company should be dissolved, the principal stock might be taken out and vested in some other company, and there might be annuities that might probably continue for ever, and yet not payable out of land, as in the instance of Sir *Thomas White's* (*a*) charity, which had lasted a century and a half; where there was a disposition of money to be employed, by continual rotation, in loans to poor tradesmen of several sums to be let out for a stated number of years, and then to be repaid; and any man may at this day give, by will, a perpetual charity in this manner; but if a man by will secures such loans by lands, or purchase of lands, his devise will be void, and contrary to the statute of mortmain. As to the annuity of 5*l.* there were fewer objections to that than the other; for there was no direction at all for any money or personal estate to be laid out in land, for the executors were only directed to "secure and settle 5*l.* a year," &c. which must be secured upon a personal fund, consistent with the testator's intention. The bequests were decreed to be

(*a*) *City of Coventry* v. *Attorney General*, 2 Vern. 397; *S. C.* Colles' P. C. 280; 7 Br. P. C. 236, Toml. ed., *post.*

good, and the money to be invested in South-Sea Stock, for the charitable purposes mentioned in the will (*b*).

So, where a testator who left no real estate, devised 20*l.* a-year to his brother for life, to be paid half-yearly, out of the interest money in the public funds, or mortgages, or any his real or personal estates of which he should stand invested; and gave the residue of his real and personal estates to his wife for life, and to dispose of at her death; and then directed the remainder of his estate after his wife's death, to be divided into 24 parts, 19 of which he disposed of; and by a codicil he directed the remaining 5 twenty-fourths, after the death of his wife and the payment of his debts and legacies, and the annuity of 20*l.* a-year, after the death of his brother, to be applied in clothing and educating 20 poor boys, sons of parishioners of *Brighthelmstone*, in *Sussex*, in the principles of the Protestant religion, agreeably to the national and established Church of England, and in reading, writing, arithmetic, merchants' accounts and navigation; none to be admitted after eight or continued after 15. And his will was expressed to be, that the 5 twenty-fourths of his estate after his debts and legacies paid, together with the 20*l.* a-year, after the death of his brother, or which should be deemed an equivalent to the 20*l.* a-year, (570*l.* to be invested in some of the public funds, where there was a parliamentary security,) to stand in the names of the trustees, until the whole could be laid out in the purchase of lands, to *the satisfaction* of the governors and trustees, (whom he appointed,) which lands were directed to be purchased in the names of the trustees, to the uses aforesaid, *viz.*, the interest, profits and rents of the 5 twenty-fourths of his estate, together with the interest, profits and rents of the said 570*l.*, after the death of his brother, or the lands which should be purchased therewith, should be applied annually for ever, in clothing and educating 20 poor boys as aforesaid.

On a question whether the bequest in favour of the charity

(*b*) *Sorresby* v. *Hollins*, 9 Mod. 555—558, 8th ed. 1 Coll. Jur. 439. by Leach, 221; 2 Burn's Eccl. L.

was not void by the mortmain act, Lord *Hardwicke* said, he did not lay any weight on the directions to place the money in the funds in the first place, for that would be to make the validity of a will depend upon the order of the words. The direction is *to place the money in the funds until laid out in lands to the satisfaction of the trustees.* When can that be? Not while the statute of mortmain is in force. Suppose it had been, till by law it may be; such bequest would be good. These words must mean, when the trustees approve of laying it out: that cannot be while the statute of mortmain is in force; it would be to act contrary to the trust. Although the rule of construction as to the devise of money to be laid out in land, continued the same as before the statute, if the trustees would not act, the trust would devolve on the court, which would order the money to be placed in the funds, and not invested in lands, as was always done by Sir *J. Jekyll,* before the statute. An observation arose on the face of the will, as if the testator had thought the bequest might continue in government securities for ever. He directed the application of the interest, profits and rents of the 5 twenty-fourths, and of the 570*l.*, or of the lands which should be purchased therewith; which being in the disjunctive, seemed to give an election. The words *for ever,* were applicable to both alternatives." The bequest, therefore, was held valid (*c*).

The following words used by a testator, after giving the interest of a legacy for the benefit of preachers at a particular chapel:—" As money is of more uncertain value than land, I do also give them (the trustees) power to make such purchase as they shall think best for perpetuating the gift;" were held not to bring the legacy within the mortmain act, the words not amounting to a direction to the trustees to purchase lands as the more permanent security, but conferring no further discretion than the selection of such an estate as would con-

(*c*) *Grimmett* v. *Grimmett,* Ambl. 210; *S. C.* 1 Dick. 251; 1 Coll. Jur. 454—457. It is said, that this case is not to be extended to others not exactly similar, 2 Cox, 301; 1 Ves. jun. 548. See also *English* v. *Ord,* Highmore on Mortmain, 181, 2nd ed.

stitute an advantageous investment of the money, as the words seemed to relate to an event which had not happened (*d*).

Where a will gave the residue to be laid out in the purchase of lands, which was followed by the following clause—"In case my said intended charity cannot by the laws of the realm take effect in the manner as I have expressed myself, then I do hereby give the money arising by sale to the said trustees, upon trust, to dispose of the same for such charitable uses, intents and purposes, as shall be as near agreeable to the trusts, intents and purposes hereinbefore expressed, as may be, and the laws of the land will admit;" it was held, that the clause was fraudulent and void, being inserted as a means to intimidate the heir-at-law and next of kin, and to prevent their opposing the charity (*e*). But it has been determined, that a condition is valid which looks forward to the possibility of the court deciding that the gift is unlawful (*f*).

Negative words used by a testator, shewing his intention to be, that the money shall not be applied to purchase or keep in repair any real estate, but that the bequest was intended to form an auxiliary fund, to go in aid of other donations, on the supposition, that some other person will supply a house for the intended charity, will support the gift. As where a testator used the following words—"Whereas it is my wish that a blue coat school be erected at *Oldham*, and a blind asylum established at *Manchester*, under the management and direction of certain trustees, to be hereafter appointed; I hereby give and bequeath 20,000*l.* in trust, to the said trustees to each of the said charities, subject to such uses, limitations and conditions, as shall afterwards be determined for the government thereof;" if the will had stopped there the court held, that the bequest would have been void, but the subsequent words in the will were held to support it, "*but* I direct that the said monies

(*d*) *Attorney General* v. *Goddard*, 2 Eden, 207, 214.

(*e*) *Attorney General* v. *Tyndall*, Turn. & Russ. 348.

(*f*) *De Themmines* v. *De Bonneval*, 5 Russ. 92; *ante*, pp. 90—92.

shall not be applied in the purchase of lands, or the erection of buildings, it being my expectation, that other persons will, at their expense, purchase lands and buildings for those purposes." In his second codicil, the testator directed, that the money bequeathed to the blue coat school and to the blind asylum, should continue in the firm at *Oldham*, in conformity to and during his articles of partnership, and for such longer time as his executors should consider the principal and interest secure, for the benefit of the charities, "it being his will, that the interest of the said legacies be paid annually to the trustees of the said charities, for the maintenance and support thereof." Sir *J. Leach*, V. C., held, that the trustees had a title to that annual payment from the death of the testator, and must apply it in the maintenance and support of the charities; although the expectations of the testator, with respect to the purchase of buildings by others, seemed in fact to have been wholly disappointed, as the testator, in another codicil, expressed an intention, not perfected, of appropriating a particular close for the building of the blue coat school. The charities were therefore established; and the consideration of the particular manner in which they were to be administered, was reserved until after the accounts were taken (*g*).

A bequest in the following words, was held not to amount to a direction for building or hiring a school: "I direct also, that my executors or the survivor, &c. do pay, out of some part of my money in the funds, the yearly sum of 200*l.*, for and towards the support of a school at *Ross*, in *Herefordshire*, at the discretion of my said executors" (*h*).

4. *When bequests of money to improve lands in mortmain are valid, and when not.*] It was held by Lord *Northington*, that building on a site already in mortmain, was laying out money in realty; and therefore, contrary to the spirit of the act, and opening a door to evade it, to those donors who were

(*g*) *Henshaw* v *Atkinson*, 3 Madd. 306. See *Attorney General* v. *Hinxman*, 2 Jac. & Walk. 276.

(*h*) *Attorney General* v. *Jordan*, 27 July, 1791; Highmore on Mortmain, 225, 2nd ed.

indifferent in what species of charity they bequeathed their money, and that, if that were allowed, almshouses would be turned into palaces, and small spots of ground covered with immense buildings (*i*). But that doctrine, which, if pushed to its extent, would have prohibited all repair or improvement of existing buildings on lands in mortmain, has been overturned by subsequent authorities. For it is now clearly settled, that it is competent to a testator, though not to give directly any interest in land to a charitable use, to leave a sum of money for the purpose of *meliorating*, as it is called, any land, or for beautifying, sustaining or repairing buildings already vested in trustees for charitable uses; and many cases have been determined upon the distinction, whether it is clear, the testator meant the money to be applied in erecting, sustaining or repairing buildings already vested in trustees for charitable uses, or intended fresh land to be purchased for that purpose (*j*).

A bequest, by a rector and incumbent of a parish, of two sums of money, to be laid out for the benefit of his successor in the rectory, in building a new parsonage house on the glebe of the rectory, with other buildings; was held not to be within the meaning of the statute; which only intended to prevent new acquisitions in mortmain, and erecting a building was not to be considered as such, for if the testator had not made such a gift, money might have been recovered for dilapidations, which must have been laid out upon the building (*k*). So a legacy for repairing a free chapel, on part of the testator's estate, which, at the time of the will, was in mortmain, was held good (*l*).

And where a legacy was given "towards the erecting and endowing of an hospital for the county of *Dorset*," which it was admitted was void, if it were necessary to buy land whereon to build the hospital, yet being good in aid of an

(*i*) *Attorney General* v. *Tyndall*, 2 Eden, 213. See also *Blandford* v. *Thackerell*, 2 Ves. jun. 238.

(*j*) *Vaughan* v. *Farrer*, 2 Ves. sen. 189; *Attorney General* v. *Nash*, 3 Br. C. C. 595 n. by Belt; *Corbyn* v. *French*, 4 Ves. 427, 428.

(*k*) *Glubb* v. *Attorney General*, Ambl. 373.

(*l*) *Harris* v. *Barnes*, Ambl. 651.

existing hospital; the court referred it to the Master to inquire, whether there was any hospital existing in *Dorsetshire* (*m*).

So where a testatrix gave by will money to her trustees to be laid out in the erecting and new building of a neat parsonage house, at the upper end of the garden belonging to the said parsonage house, to be from time to time enjoyed by the incumbents of the living; a decree was pronounced in favour of the charity as no land was to be purchased (*n*).

Bequests of money to build a church where the chapel then was (*o*), and to be laid out upon repairing parsonage houses generally, were held good upon the same principle (*p*).

So a legacy for building two additional rooms to a rectory house was held good, for such a purpose required no more land to be put in mortmain (*q*).

A testator who has duly conveyed property in his lifetime for charitable purposes, may by his will give money for the support and improvement of the original gift. Thus, *E. Tawney*, by an indenture of bargain and sale dated the 17th of January, 1797, duly executed and inrolled according to the statute 9 Geo. II. c. 36, conveyed unto and to the use of the mayor, bailiffs, and commonalty of the city of *Oxford*, two freehold messuages with the gardens and appurtenances in the suburbs of that city, in trust, to permit three poor men and three poor women to be nominated from time to time by the said *E. Tawney* during his life, and after his decease by such person or persons, trustee or trustees, and in such manner and form, and under such restrictions and conditions as the said *E. Tawney* had, or should, by any deed or writing, or by his last will and testament in writing, or any codicil thereto executed in the presence of two or more credible witnesses direct, limit, or appoint. *E. Tawney* by his will, dated the 20th of January, 1800, (among other

(*m*) *Foy* v. *Foy*, 1 Cox, 163; *S. C.* cited 3 Br. C. C. 593.

(*n*) *Brodie* v. *Duke of Chandos*, 1 Br. C. C. 444 n.

(*o*) *Attorney General* v. *Bishop of Oxford*, 1 Br. C. C. 444 n. (q).

(*p*) *Attorney General* v. *Bishop of Chester*, 1 Br. C. C. 444.

(*q*) *Attorney General* v. *Munby*, 1 Mer. 327.

things) gave to the said mayor, bailiffs, and commonalty, and their successors for ever, 4500*l.* stock in the 3 per cents consol. bank annuities, upon trust to pay the interest and dividends thereof from time to time, as the same should become due for ever in manner after mentioned:—20*l.* a-year each by half-yearly payments to three poor men and three poor women of the city of *Oxford* or suburbs thereof for ever, to be nominated as thereinafter expressed, for and during the term of their natural lives; and from and after payment thereof, in trust to pay, lay out, and expend as occasion should require, the remainder of such yearly interest and dividends, at such times and in such manner, as the trustees thereinafter named should direct, in rebuilding, repairing, altering or *adding to*, and improving the messuages or tenements, ground, and appurtenances conveyed by the said testator unto the said mayor, &c. by bargain and sale inrolled, for the use and benefit of such poor men and women who were to reside and live upon the said premises. An information having been filed after the death of the testator on behalf of the corporation of *Oxford*, praying that they might be declared entitled to the legacy of 4500*l.* stock upon the trusts of the will, and that the executors might be decreed to transfer the same. Lord *Eldon* said, "In the present state of the doctrine of this court, as the testator had in his life effectually conveyed the land, so as to satisfy the statute for this charity, even if the will had been made for the purpose of maintaining and supporting these poor men and women, the will being intended only to operate as prescribing the mode in which they are to be maintained and supported; this bequest according to the current of modern authorities, so far as it is understood not to direct purchases of land to be made, is good; but as far as the words *adding to* relate to some part of the context, it is not good; for it is not only *adding to* the messuages or tenements which may be considered to be upon the ground already in mortmain, but it is *adding to* and improving the messuages or tenements, ground and appurtenances." As the testator had adverted to land already in mortmain, by referring to his own

deed, it was declared that the legacy of 4500*l.* stock was good, as far as the payment of 20*l.* a-year each to three poor men and three poor women according to the will, also so far as the surplus was directed by the will, to be applied in rebuilding, repairing, altering, or improving the messuages or tenements, grounds and appurtenances, and so far as the additions directed by the will should be made upon the land conveyed by the testator for the better residence of such poor men and women; but that it was bad, so far as any additions were to be made to the ground by acquiring other land (*r*).

It is sometimes a question whether the land to which a testator has referred, was in mortmain or not, at his death; in such a case, if the court entertain any doubt upon the point, it will be referred to the Master to inquire, whether the house or land had been in any and what manner, and by whom appropriated to charitable purposes, at the death of the testator (*s*).

Where it appeared that a school-house had been built prior to the 9th George II. c. 36, on the waste of a manor given by the lord for that purpose, and paid for by subscription from the lord of the manor and other parishioners, and never subsequently used otherwise than as a public school-house, it was held to be so dedicated to the charity, and in mortmain, that a bequest for the purpose of repairing and enlarging it, and of providing a salary for the schoolmaster, was a valid legacy (*t*).

Where stock was given for rebuilding certain almshouses, and the only question was, whether the lands upon which they were built were in mortmain before the passing of the act 9 George II. c. 36, that fact was proved from an old inscription carved in stone, and fixed in the centre of the front of them, and by an extract from a local history, published in 1735, in which the almshouses were mentioned (*u*).

Unless a testator distinctly points to some land already in mortmain, he will be understood to mean, by a direction to

(*r*) *Attorney General* v. *Parsons*, 8 Ves. 186—192. 342.

(*s*) *Ingleby* v. *Dobson*, 4 Russ.

(*t*) *S. C.* Ibid.

(*u*) *Shaw* v. *Pickthall*, 1 Dan. 92.

build, that an interest in land is to be purchased, in which case the gift cannot be sustained.

In the *Attorney General* v. *Hyde* (*x*), the testatrix ordered the sum of 1500*l.* to be paid, and laid out under the direction of the minister and churchwardens of *Royston*, for the time being, for the purposes of erecting a free school there, for 12 poor boys and 12 poor girls of that parish, and directed, that as soon as the same should be built, 2000*l.* should be placed out at interest, and the interest applied for the maintenance of a schoolmaster and schoolmistress, and for teaching the boys and girls to read, write, &c. It appeared that there was a piece of ground in the parish, formerly part of the waste, upon which a schoolhouse had been built; which fact, it was contended, was in the testatrix's contemplation, and that her intention was, that the school should be re-erected upon that foundation; but Lord *Bathurst* thought, as the testatrix had not pointed at that particular piece of ground, but appeared to mean, to have a school-house of her own foundation, it must be taken as a mere bequest for the purpose of building a school, which was void.

A charitable society, called *The Butchers' Charitable Institution*, was formed by certain men of opulence in that business, for the relief of the poorer members of the trade. In the year 1829, it was proposed, by the members of that institution, that almshouses should be built, in which poor members, who were to be relieved, should reside; and a person of the name of *Knight* offered to supply a piece of ground for the purpose. At a meeting of the members in July, 1829, it was resolved, that *Knight's* offer should be accepted; and various sums were subscribed towards the erection of the almshouses, and a building fund was formed; and the title deeds of that piece of ground were sent by *Knight* to the officers of the institution, and some of them were let into the receipt of the rents and profits of the land. In the latter end of the year 1831, which was during the

(*x*) Ambl. 751; *S. C. nomine Attorney General* v. *Hutchinson*, 1 Br. C. C. 444 n. See 6 Ves. 408, 5 Sim. 659.

time when the trustees of the institution, were in the receipt of the rents of the land; but before there was any actual conveyance made of the land, a person named *Graves*, who was himself a member of the institution, and acquainted with the resolution respecting the almshouses and building fund, and the offer of the land made by *Knight*, made his will, by which he bequeathed in these words: "I give and bequeath to the *Butchers' Charitable Institution*, the sum of 5000*l.*, towards building almshouses to the said institution." After his death, a conveyance of the land was made, according to the requisitions of the statute 9 George II. c. 36. On a bill filed by persons representing the charitable society, against the testator's executors, for payment of the legacy, Sir *L. Shadwell*, V. C., said, that he could not, according to any fair and reasonable interpretation of the words of the bequest, hold that the testator did point at the land in question, or any other land; for the words are, "I give and bequeath to the *Butchers' Institution* the sum of 5000*l.*, towards building almshouses to (which his Honour considered to mean the same as *for*,) the said institution." He admitted, that if the testator had said "towards building the almshouses," the court might have held that those words did point at the land; but he had used general terms. Therefore, though his Honour had no doubt in his own mind, what the testator intended, he was bound to say as a judge, that the intention was not so expressed as to enable the court to order the legacy to be paid, but the case was so fit to be brought under the consideration of the court, that the bill was dismissed without costs (*h*).

It was contended by the defendants in the case last cited, that the land in question was not in mortmain at the testator's death, inasmuch as *Knight* during his life was not compellable to make a conveyance of the land to the institution, before which, the charity had neither a legal nor equitable lien on the land, and the trustees at the utmost held it only from year to year, but it was unnecessary to decide that point.

(*h*) *Giblett* v. *Hobson*, 5 Sim. 651. Affirmed by Lord Chancellor, Nov. 13, 1834.

SECTION V.

Of Bequests of Personalty which fail on account of being connected with a devise of real estate.

When a bequest of personal property for charitable purposes, which if standing alone would be valid, is connected with, and dependent upon, a devise of real estate which is void by the statute 9 George II. c. 36; the devise being the principal, and failing, the accessory must fail with it (*i*).

Thus, where a testatrix being seised of nine freehold houses, and of other leasehold houses, and of 800*l.* 4 per cent. Bank Annuities, devised as follows, after the death of a party to whom the *houses* were given for his life, "I give my nine houses in Vine-street, eight to eight poor people that have paid most and longest to the poor's books in *St. Mary Overy's* parish, as the books shall prove; the corner house to repair them. And the dividends of 800*l.* in the 4 per cent. Bank Annuities, at the death of *John Bayley*, I give to the eight houses for ever, to each house the 4*l.* every year for ever, as the Bank pays the dividend." A bill having been filed, praying that it might be declared, that the bequest of the interest and dividends of the 800*l.* 4 per cent. annuities, to charitable purposes, was a good and subsisting bequest for the benefit of poor persons of that parish, or for some other charitable purpose, for the benefit of the said parish, and for other directions. The gift of the houses being clearly void, and the inhabitants of those houses being the principal objects of the bounty of the testatrix, and no intention of applying the fund to any other purpose appearing in the will, it was held, that the gift of the stock was void (*j*).

(*i*) *Attorney General* v. *Davies*, cited 2 Jac. & Walk. 274. 9 Ves. 535; *Chapman* v. *Brown*, 6 Ves. 410; *Adams* v *Lemberey*, 2 Br. C. C. 428.

(*j*) *Attorney General* v. *Goulding*,

Again, where a testator devised four houses to the churchwardens and vestrymen of *St. Martin's Sarum*, in trust for such poor men of that parish as they thought fit, desiring a preference to be given to the descendants of a particular individual, and proceeded "as I intend these four houses to be in the manner and custom of almshouses for men and their wives, I give and bequeath to the churchwardens and vestrymen of *St. Martin's Sarum*, the sum of 2000*l.* four *per cent.* government securities, in special trust for them to dispose of the interest in the following manner; that is to say, my will is for them to give or allow to each of the four persons, that they allow or permit to inhabit the four houses, the sum of 13*l. per annum* or 5*s.* a week to be paid weekly, monthly, or at their discretion; that is for a man and his wife: if one of them die, the single one to have 3*s.* 6*d.* a week, and not permitted to bring in a second husband or wife." The testator having afterwards placed four of his relations in the houses in question, conveyed them by deed inrolled to trustees, in order that the same might be at all times used as almshouses and occupied by four poor men and their wives, to be chosen as mentioned in the deed, which became void in consequence of the testator's death within twelve months after its execution. An information was filed, praying that the bequest of the 2000*l.* stock might be established, and the fund transferred to the relators to be appropriated according to the intention of the testator, or as near thereto as the circumstances might admit, or otherwise that it might be declared to what extent the bequest was good. It charged, that if so much of the bequest of 2000*l.* stock as related to the persons to be inhabitants of the four tenements was void, yet the plaintiffs were entitled to the benefit thereof for their lives as a personal bounty to them. It was contended, that though the gift of the four houses was void by the statute 9 Geo. II. c. 36, yet that the bequest of the 2000*l.* stock appropriated for the maintenance of the poor men and women, might be supported as not being essentially connected or belonging to it, but as denoting a general intention; which though the rest failed, might be fulfilled. It was

held by the court, that according to the true construction of the will, the intention was to make an endowment of almshouses, that there was no general intention beyond that, and therefore that the bequest so far as it concerned those almshouses, must fail with the object to which it was attached. Lord *Alvanley*, M. R., said, "*The Attorney General* v. *Goulding* (*k*), is almost precisely in point. I believe I have intimated a doubt upon that case (*l*), I thought it a more rigid construction of the rules of the court upon charitable bequests, than in prior cases had been adopted. Upon consideration of that case, I agree that it is right; but I do not agree with what Mr. Justice *Buller* is stated (*m*) to have said, that the rule of the court to execute the charitable purpose in another way has been varied; I perfectly agree with the rule laid down; but I deny that it has been varied; nor was it necessary to support that decision, that it should be varied; for the ground of it appearing in the report is, *that applying the charity to any other object would be contrary to the intention.* It is said, an intention to give this provision to any poor men and women may be collected. If I could collect that intention, I would execute it; but I cannot: and so it is not enough to say, it is not inconsistent with that intention, or that if the testator could have foreseen the failure of his object, he would have given it to poor men and women without regard to the houses. Perhaps he would, but can I judicially pronounce that he would; or, (for such is the office of a judge) can I fairly infer that he would upon this will? I cannot. An endowment with a restriction as to another wife or husband, an endowment where the conduct

(*k*) *Ante*, p. 195.

(*l*) See 3 Br. C. C. 379, 2 Ves. jun. 388.

(*m*) 2 Br. C. C. 430. With reference to the question whether the court could apply the legacy of 800*l.* *ante* p. 195, to some other matter *ejusdem generis*, *Buller*, *J.* said, "the court has certainly thought it could vary the use, but the rule may be drawn from the cases, that wherever the court had directed the sum given to be applied to a different use, there has been proper ground for the court to say the use to which it has been applied is consistent with the use declared in the will, but there have been subsequent cases *which have varied the rule.*"

of the parties is under the control of the trustees, is very different from a charity for poor men and women in general. I cannot create *another* charitable object for him, or apply this to any different object so as to be warranted in saying, I fulfil the intention (*n*)."

Where a testator, who had by deed inrolled caused lands to be conveyed to trustees for charitable purposes, died within twelve months after its execution, having by his will made several bequests by reference to the trusts of the deed, it was held, that all the bequests failed because their validity depended on the deed (*o*). A recital in a will, that property consisting of mortgages had been given by deed, which failed not by any defect in the instrument itself, but in consequence of the grantor not having lived to the period prescribed by the statute for rendering the deed effectual, was held not to operate as a confirmation, or by way of relation, so as to pass the property thereby assigned to a college, which was capable of taking the benefit intended (*p*).

Where a plain trust and disposition to a charitable use are manifested by the will, and intended throughout; but that disposition is also attended with a certain degree of personal bounty and favour to particular objects, the case will not be taken out of the statute, unless the personal bounty can be totally separated from the general object, in respect of which they are to have the preference. Thus where there is a general disposition to a charitable use, and the testator appoints the first preacher to exercise that function, the case is not taken out of the statute—the principle being, that mere personal favour, confidence, and benefit too, manifested clearly by a preference made in favour of a particular individual, as the first object of the testator's bounty, will not separate the favour from the void trust.

Thus where a testatrix, having endowed a chapel at *Fakenham*, directed by her will that 600*l.* should be in-

(*n*) *Attorney General* v. *Whitchurch*, 3 Ves. 141. See *Blandford* v. *Thackerell*, 2 Ves. jun. 238; *S. C.* 4 Br. C. C. 394; *ante*, p. 180.

(*o*) *Price* v. *Hathaway*, 6 Madd. 304.

(*p*) *Attorney General* v. *Munby*, 1 Mer. 327.

vested in the purchase of lands and some small annuities, to be paid out of the rents, she directed all the residue to be paid, in equal moieties, one to her friend, *T. Mendham*, for life, the other to her friend *Eastaugh* for life; and, after the death of *Mendham*, one-third part of the interest or rents to be paid to the preacher or teacher who should statedly officiate in the chapel at *Briston*, belonging to *Mendham*; the other two-thirds to *Eastaugh* for life, he and the said preacher exchanging upon the Lord's Day alternately, the one at *Fakenham*, the other at *Briston*, provided that *Mendham* and *Easthaugh* did not voluntarily withdraw from and refuse officiating, when able, at the said *Fakenham* chapel, as usual; if they did, the share of him or them, during such recess, to cease and go to the preachers appointed in his or their room; and after the death of the survivor of *Mendham* and *Easthaugh*, the interest or rents to be paid for ever to the successive preachers, who should be chosen by the trustees of *Fakenham* and the trustees and major part of the communicants of *Mendham* chapel, at *Briston*; it was also provided, that in case *Easthaugh* should discontinue to preach at the chapel, he should take nothing under the devise."

Lord *Thurlow* made a decree, containing a declaration that the devise was not void, so far as it respected the immediate annuitants; but it was decided by the Lords Commissioners that the two ministers named in the will had not an interest which could be separated from the trust, which failed; for although a personal bounty was intended for them by the testatrix, yet it flowed from a confidence in them in their character of the ministers of the chapels, and no benefit was intended for them distinct from their officiating at the chapels (*q*).

We have already shown that gifts of money, to be expended in building on lands not in mortmain, to be used for charitable purposes, are void (*r*). The cases also uniformly decide that if

(*q*) *Grieves* v. *Case*, 1 Ves. jun. 548; *S.C.* 2 Cox, 301; *ante*, p. 169. See *Doe* d. *Phillips* v. *Aldridge*, 4 T. R. 264; *ante*, p. 144.

(*r*) *Ante*, pp. 168—178.

the money given is to be employed, in the first instance, in purchasing land for buildings, in which the charitable objects are to be carried on, and the surplus is to be employed for the benefit of the persons who are to live in such buildings, which cannot be obtained without violating the provisions of the statute 9 Geo. II. c. 36, a gift for those persons which, if standing alone would have been valid, will fail altogether. Thus, though money may be given to an infirmary or a school, yet, if such bequest is connected with a purpose of building an infirmary or a school, and the money is then to be laid out upon it when so built, the purpose, which is the foundation failing, the superstructure must fail with it (*s*).

When an undefined portion of a fund is given to a void charity, and the residue of such fund for legal charitable purposes; but it cannot be ascertained how much was intended or would be required for the illegal object, the gift will fail altogether (*t*).

Thus where the residue of real and personal estate was bequeathed to executors, in trust, to build or purchase a chapel, where it might appear to be most wanted, and any overplus which should remain, after purchasing or building the same was directed to go towards the support of a faithful gospel minister (not exceeding 20*l.* a-year); and the farther surplus, if any, to be laid out in such charitable uses as the executors should think proper. The first bequest having been declared void, a question arose whether the bequest of the surplus could be carried into effect. Sir *W. Grant*, M. R., held, that the testatrix intended the 20*l.* a-year for a minister of her own chapel, and not for the support of a minister generally, as was contended; and therefore that the gift failed, as the chapel was not to have existence; and he said that he had been a good deal embarrassed as to the ultimate bequest. "Standing by itself, a bequest of a residue to be employed in such charitable purposes as the executors shall think proper, is a good bequest, supposing it legal to do as the testatrix

(*s*) 10 Ves. 538. *Attorney General* v. *Davies*, 9 Ves. 535.

(*t*) *Chapman* v. *Brown*, 6 Ves 404;

had directed, and a residue had been left after those purposes were answered, there would have been a good bequest of it; and therefore the question is, whether that ulterior bequest is to fail, because the prior bequest cannot take effect? If it could be reduced to any certainty, how much would have been employed by the executors for the other purposes; the residue ought to be employed under this last direction, *viz.* for charitable purposes generally. I have considered whether that can be ascertained by a reference to the Master, to see how much would have been sufficient for this chapel; but, upon consideration, it is quite impossible to give any direction that would not be vague and indefinite to a degree almost ridiculous. An inquiry, what they might have employed for building a chapel, without knowing what kind of chapel, the testatrix having given no grounds to ascertain what kind of chapel, no locality. It is utterly impossible to frame any direction that would enable the Master to form any idea upon it. If she had even pointed out any particular place, that might have furnished some ground of inquiry as to what size would be sufficient for the congregation to be expected there; but this is so entirely indefinite, that it is quite uncertain what the residue would have been, and therefore it is void for that uncertainty. She had no view to any residue, but a residue to be constituted by actually building a chapel. She contemplated no residue but with reference to that. It is impossible to ascertain it in the only manner in which she meant it to be ascertained. It is impossible for the court to apply it;" and it was declared that the devise and bequest for charitable purposes were void, and that the real estate belonged to the heir-at-law, and the personal to the next of kin (*u*).

In another case, there was a devise of a messuage to one person for life, with remainder to the testator's executors, "in trust, that the same might be appropriated to the use of the master that might be appointed to a school, for the instruction of poor persons belonging to the parish of *Week*, for so long

(*u*) *Chapman* v. *Brown*, 6 Ves. *Hinxman*, 2 Jac. & Walk. 277, 278 410, 411. See *Attorney General* v.

a time as his interest therein should continue." After a direction to the executors out of the testator's personal estate, to put the house into repair, the will contained a subsequent clause, as follows:—"And I do desire and direct that my executors (hereinafter named) shall lay apart, from my personal estate, the sum of 2000*l.* and invest the same in the purchase of stock, in the name of the minister, churchwardens, and overseers of the poor of the parish of *Week* aforesaid, upon trust, that they do pay and apply the interest, dividends, and produce of so much thereof as they may think necessary, in procuring a master and mistress for instructing poor children in reading, writing, and needlework, and bringing them up in the principles of the established church, and keeping the *schoolhouse* in decent repair; and upon this further trust, that they do pay, apply, and distribute the residue, if any, of the said interest and produce, after payment of the expenses of the said school, as aforesaid, unto and amongst such poor families and persons, parishioners of and resident in *Week* aforesaid, at such times and in such proportions as the said minister, churchwardens, and overseers shall think proper." The testator, by a codicil to his will, gave to his executors 1000*l.*, in aid of the sum of 2000*l.* he had directed to be appropriated for the endowment or purposes of a school for children. The devise of the house appeared to have been revoked; but if not, it was held to be clearly void on the face of the will.

An information was filed to obtain the declaration of the court that the bequests of 2000*l.* by the will, and 1000*l.* by the codicil to charitable purposes, were good and valid, and a reference to approve a plan for their application. It was decided that the bequest for the benefit of the school was so connected with the primary gift, that it fell to the ground; and the amount to be appropriated to the primary object being unascertained, the gift of the residue, which depended on that, was also void. It will be observed, that in this case the testator referred to the schoolhouse, which he had given to the use of the master, and not to any other house that might be procured by the trustees, or given by some other

person for the use of the school: and that the bequest was not intended to form an auxiliary fund in aid of other donations, on the supposition that some other person would give a house, which would have removed the difficulty, and brought the case within the principle of some cases already considered (*v*). Part of the fund being appropriated to the master and mistress, and some undefined part of it to be applied to the repair of the house, the legal and illegal purposes could not be separated, and the whole gift failed. The trustees had no discretion in the application of the fund to the illegal purpose, but would have been bound, if the house had been out of repair, to have appropriated part of the fund in support of the house, but how much was not defined (*w*).

If the legal bequest and the illegal purpose are not so connected as to be inseparable, and the proportions are defined or capable of being exactly calculated, the bequest may be supported (*x*).

Where a testator directed a freehold estate to be sold, and the produce applied, with so much of the personal estate as should be necessary, to secure an annuity of 30*l.* a-year for the life of A., and after his death the principal to go to a charity, although the charitable bequest was void, as to so much of the fund as was produced by the sale of the real estate, yet it was held valid, as to the rest of the sum required from the personal estate to secure the annuity (*y*).

Where a testatrix devised a house to trustees and their heirs, upon trust, to deposit in the house certain books for the use of the Welch charity school, for the increase and improvement of Christian knowledge, and to preserve the books in the house for such use, and to permit her servants who should look after the books to live in the house clear of rent and taxes. It was held, that there was not enough to bring the case within the authority of the cases where the principal devise having failed, the bequest of the personal

(*v*) *See ante*, pp. 178—182.

(*w*) *Attorney General* v. *Hinxman*, 2 Jac. & Walk. 270.

(*x*) *Blandford* v. *Thackerell*, 2 Ves. jun. 238; *S. C.* 4 Br. C. C. 394; *ante*, pp. 179, 180.

(*y*) *Waite* v. *Webb*, 6 Madd. 71.

property, as connected with it, must fail also: for it appeared that the testatrix meant, that the house should be subservient to the distribution of her books; but it was not necessarily connected with her purpose, for the will contemplated the time when the charity might continue, and the house be no longer applicable, and there was enough in the will to give the personal estate to charitable purposes, connected with the plan of promoting Christian knowledge (*z*).

SECTION VI.

Of the right of Heirs-at-Law, Devisees and next of Kin of Testators, to the benefit of void devises and bequests to Charitable Uses.

1. *When the heir-at-law is entitled to void charges*, p. 206.
2. *When devisees are entitled to void charges*, p. 209.
3. *Questions between real and personal representatives in cases of conversion of real estate*, p. 214.
4. *Release from next of kin not presumed*, p. 225.

GENERALLY speaking, the heir-at-law of a testator will be entitled to such real estates as are devised to charitable uses, which are void by the statute 9 George II. c. 36, and the next of kin or residuary legatees will take such personal estate as is ineffectually given for those purposes; questions, however, have in some cases arisen between the different representatives of a testator, which will now be considered.

The cases in which the crown or the Court of Chancery has the power of directing the application of the fund to other purposes than those expressed by the testator, will form the subject of separate consideration, for in such cases the gift itself is not void.

It is a clear principle of law, that an heir cannot be dis-

(*z*) *Attorney General* v. *Stepney*, 10 Ves. 21, 29.

inherited without plain words of gift or necessary implication; and in doubtful cases the title of the heir will prevail(*a*). A resulting trust arises in favour of the heir-at-law, with respect to all real estate of his deceased ancestor, or the produce of such estate of which no lawful disposition is made (*b*).

Where land, or such an interest in land, as would descend to the heir-at-law, is undisposed of by will, the heir-at-law will have the benefit of all which is not disposed of; and if the testator has given the *legal*, but not the *beneficial* interest, then the heir will take, by way of resulting trust, all the beneficial interest of which no disposition is made. When a devise fails the interest goes to the heir-at-law, unless there appear in the will either by express words, or by necessary implication, a contrary intention (*c*).

(*a*) *Boutell* v. *Mohun*, Prec. Ch. 381; *Sympson* v. *Hornsby*, *Id.* 439; *Piggot* v. *Penrice*, *Id.* 471; *Kellett* v. *Kellett*, 1 Ball & B. 541; *Berry* v. *Usher*, 11 Ves. 92. Lord *Manners* said, "By necessary implication, I mean that implication which arises out of the words the testator has made use of, and which clearly satisfy the court as to his meaning, leaving no room for doubt or conjecture."—1 Ball & B. 542. See Swinb. on Wills, by Powell, 353. Lord *Eldon* said, "In construing a will, conjecture must not be taken for implication, but necessary implication means, not natural necessity, but so strong a probability of intention, that an intention contrary to that which is imputed to the testator, cannot be supposed."—1 Ves. & B. 466.

(*b*) *Stansfield* v. *Habergham*, 10 Ves. 280.

(*c*) The following cases show, that where there is a devise for particular purposes, which are either void or do not exhaust the whole beneficial interest, the surplus will result to the heir-at-law.—*Attorney General* v. *Whorwood*, 1 Ves. sen. 534; *Hill* v. *Bishop of London*, 1 Atk. 618; *Hill* v. *Cock*, 1 Ves. & B. 173; *Lloyd* v. *Spillett*, 2 Atk. 280; *Davidson* v. *Foley*, 2 Br. C. C. 203; *Packington* v. *Wych*, 1 Br. P. C. 372; *Randall* v. *Bookey*, 2 Vern. 425, *S. C.* Pr. Ch. 162; *City of London* v. *Garway*, 2 Vern. 571; *Hobart* v. *Suffolk*, *Id.* 644; *Bristol* v. *Hungerford*, *Id.* 645; *Starkey* v. *Brooks*, 1 P. Wms. 390; *Cruse* v. *Barley*, 3 P. Wms. 20; *Stonehouse* v. *Evelyn*, *Id.* 252; *Digby* v. *Legard*, 3 Cox's P. Wms. 22; *Ackroyd* v. *Smithson*, 1 Br. C. C. 503; *Leslie* v. *Devonshire*, 2 Br. C. C. 188; *Robinson* v. *Taylor*, *Id.* 589, *S. C.* 1 Ves. jun. 44; *Hutcheson* v. *Hammond*, 3 Br. C. C. 128; *Spink* v. *Lewis*, 3 Br. C. C. 355; *Sherrard* v. *Lord Harborough*, Ambl. 165; *Maugham* v. *Mason*,

In *Middleton* v. *Cater* (*c*), where a testator gave all his estates, real and personal, to trustees, to lay out on mortgages for the benefit of his wife and other purposes, for her life, and after her death to make sale thereof, and directed the sum of 1000*l.* to be paid to the wardens of the Fishmongers' Company, to be laid out in the purchase of lands, the rents whereof were to be applied in augmenting the weekly allowance to the poor of an hospital, it was decided that there was a resulting trust for the heir-at-law, out of so much of the provision for the charity as consisted of real estate, and for the next of kin as to so much as was personal.

There will be a resulting trust for the heir when a grantor has executed a conveyance according to the statute 9 Geo. II. c. 36, but dies within twelve months afterwards (*d*).

It has been shewn, in a former part of this work (*e*), that an heir-at-law may avail himself of a secret trust in favour of charities, connected with a devise of lands, in order to set aside the will.

1. *When the heir-at-law is entitled to void charges.*] A charge effectually made on real estate, devised to a stranger, but not well disposed of on account of being given to a charity, will be considered, as between the heir and the charity, as part of the real estate undisposed of; and the heir will be entitled to the benefit of it as a resulting trust, subject to the payment of the testator's debts. Thus where a testator devised 100*l.* and all his books to A. and B., whom he appointed his executors, and a copyhold estate to C., he causing to be paid to the testator's executors the sum of 1000*l.*; and after payment of debts and legacies, the testator gave the residue and remainder of all his estate, freehold, copyhold, and leasehold to the governors of the *Foundling Hospital* and their successors for ever. On a bill brought by the execu-

1 Ves. & B. 410; *Kellett* v. *Kellett*, 1 Ball & B. 533; *Berry* v. *Usher*, 11 Ves. 87; *Wright* v. *Wright*, 16 Ves. 188; *Wilson* v. *Major*, 11 Ves. 205.

(*c*) 4 Br. C. C. 409. See *Chapman* v. *Brown*, 6 Ves. 404; *ante*, p. 201.

(*d*) *Price* v. *Hathaway*, 6 Madd. 304; *ante*, p. 132, and n. (*o*)

(*e*) *Ante*, pp. 144—154.

tors for the 1000*l.* the devisee of the copyhold insisted that it should not be raised at all, as it was the same as if the condition had been to pay to the charity, which was an unlawful act, which could not take effect, and therefore void, and the estate absolute; and the heir-at-law claimed the 1000*l.* as a resulting trust. The next of kin insisted, that as the gift to the charity was void by the statute of mortmain, and as the particular devisee could not take without performing the condition that the 1000*l.* should go as part of the testator's estate undisposed of, according to the statute of distributions, the court held, that the condition being to pay to the executors was lawful, it not being to do an unlawful act as if it had been upon condition to pay directly to the charity, and that the heir-at-law might enter for the breach of the condition. The next of kin were not entitled, because it would be on a principle contrary to their right, for if it was turned into personalty, it must go to the governors, no part of the personalty being undisposed of. The heir-at-law therefore was entitled by way of resulting trust, unless the sum was wanted by the executors for payment of debts, for which purpose it would vest in them; but the hospital was prevented by the mortmain act from deriving any benefit from it (*d*).

Where real estate, belonging to a married woman, was limited to such uses as she and her husband, or the survivor, should appoint by deed or will, attested by three witnesses, and in default thereof to the heirs of the husband, the wife having survived, and made a disposition of the surplus produce of the estate in favour of charities, which was void by the statute of mortmain, it was declared that the heir-at-law of the husband was entitled to the residue, as far as it respected real estate, after payment of debts and the other legacies (*e*).

Where a testatrix left her real estate to trustees to be sold, the profits to be applied to the uses of the will, and directed that her debts and legacies should be paid out of her personal

(*d*) *Arnold* v. *Chapman*, 1 Ves. sen. 108. See 17 Ves. 466, 467.

(*e*) *Attorney General* v. *Ward*, 3 Ves. 327.

estate, and appointed the trustees executors, and left them the residue of her personal estate and of the money to be raised by the sale of her real, to be given by them in what charities they should think proper, particularly recommending to them the hospital at Bath. It was held, that the heir-at-law was entitled to all the money arising from the sale of the real estate, as it was still considered as such (*f*).

In *Gravenor* v. *Hallum*, (*g*) a testator devised to his executors and their heirs a messuage in *Ipswich*, subject to the payment of the several annual sums, making together 10*l. per annum*, part of which was given to charitable uses; and he devised the residue of his real estate, in trust, to be sold, and directed the monies arising from the sale of his real estate and from the rents till sold, and from his personal estate, to be distributed as therein mentioned. On a question whether the annual sums, which were void by the statute 9 Geo. II. c. 36, should sink into the estate for the benefit of the residuary legatees, or go to the heir-at-law as so much of the real estate undisposed of, Lord *Camden* held, that the heir was entitled. "The rule as to real estate is," said his lordship, "that where the intention of the testator is to devise the residue, exclusive of a part given away, the residuary devisee shall not take that part in any event. If he had said, 'I give my estates, over and above the rent-charge,' it would have been more plain; it is the same thing as if he had so expressed himself. The rent-charge is severed for ever from the devise which he gives to the residuary legatee." The court decided altogether on the testator's intention, and its strong reluctance to disinherit an heir-at-law (*h*).

In *Bland* v. *Wilkins* (*i*), lands were given to E. N. in fee,

(*f*) *Mogg* v. *Hodges*, 2 Ves. sen. 52; Belt's Suppl. 284; *S. C.* 1 Cox, 9.

(*g*) Ambl. 643.

(*h*) The decree declared that the rent-charge of 10*l.* a year, devised to charitable uses, was void, and that the heir-at-law was entitled to it, the same not having been devised to the residuary legatees of the money to arise by the sale of the testator's real estate. Ambl. 645 n. (7), by Blunt.

(*i*) Cited 1 Br. C. C. 61.

upon condition that her executors and administrators should pay 10*l.* to a charity, Sir *Thomas Sewell* held, the 10*l.* should go to the heir-at-law, as part of the residue of the land undisposed of. So the heir-at-law was held entitled to the produce of *descendible* freeholds, which were devised in trust to sell and pay legacies to charities (*k*).

2. *When devisees are entitled to void charges.*] A distinction not very easy of application has been made, that if the estate be given to devisees (*l*) in such a way that a charge is to be created by the act of *another* person, raising a question between that person and the devisees, the heir has no claim; but if the devisor (*m*) has himself created the charge, and to the extent of that charge the intention appears on the face of the will, not to give the estate to the devisees, it will

(*k*) *Hillyard* v. *Taylor*, Ambl. 713. In a case where lands were limited by a will for a term of years, upon trust, to raise 20,000*l.* out of the rents, to be applied in the purchase of lands, to be conveyed to such persons as should then be in possession of certain other estates, and subject to the term the estates were limited to A. for life, with remainders over; and it happened that the person so in possession at the time when the conveyance should have been made, was not in existence at the time of the testator's death, so that the uses were void. On a question whether the term was void, because its object could not be carried into effect, or whether the heir should take the interest given for particular purposes, Lord *Eldon* said, suppose it had been a devise to the use of a charity, which the law would not permit to take effect, the cases authorize me to say, that the beneficial interest in the term would not go to the devisee, unless it clearly appeared that such was the intention of the testator. Here the interest is given *minus* in value 20,000*l.* and only with a deduction of that sum. The testator, then, has said that the devisees shall not take it. The policy of the law will not permit the uses for which the testator intended it to take effect; and, in such a case, in the absence of any expression of intention on the part of the testator with respect to a purpose which the law will allow, the doctrine of law is this, that he shall take the interest, who takes independent of all intention, and on whom the law casts it; and therefore the money will be raised for the heir-at-law, and not for the devisees. *Tregonwell* v. *Sydenham*, 3 Dow, 194.

(*l*) *Levet* v. *Needham*, 2 Vern. 138.

(*m*) *Emblyn* v. *Freeman*, Prec. Ch. 541.

to the extent of that charge, the particular object failing, go to the heir; but such a question upon a will is always as to the testator's intention (*n*).

In the case of a *charge* upon real estate, which is void by the statute, it is laid down, that it shall sink in favour of the devisee, but it is otherwise where it is an exception out of the devise. Thus, where 1000*l.* was directed to be laid out in lands for an individual, charged with an annual sum for a charity, a decree as to the void charge was made in favour of the *specific devisee*, in preference to the residuary legatee (*o*).

Where a testator devised real estates to a person in fee, subject to, and charged with payment of any sum not exceeding 10,000*l.*; to such persons, and at such times, and in such proportions as the testator, by a letter or other note, or memorandum or writing under his hand, to be delivered to, or left with the devisee, should appoint; not doubting or distrusting her honour or integrity in the performance of his will and intention therein.

(*n*) See 19 Ves. 363, 364. The following cases, in addition to those stated, may be cited as exceptions to the rule that there will be a resulting trust for the heir.—*Coningham* v. *Mellish*, Prec. Ch. 31; *Rogers* v. *Rogers*, 3 P. Wms. 193, *S. C.* Cas. temp. Talb. 268; *North* v. *Crompton*, 1 Ch. Cas. 196; *Mallabar* v. *Mallabar*, Cas. temp. Talb. 78; *Cook* v. *Duckenfield*, 2 Atk. 562; *Popham* v. *Lady Aylesbury*, Ambl. 68; *Kennell* v. *Abbott*, 4 Ves. 802; *Wright* v. *Wright*, 16 Ves. 188. See also *Hope* v. *Taylor*, 1 Burr. 268; *Hardacre* v. *Nash*, 5 T. R. 716; *Smith* v. *Coffin*, 2 H. Bl. 444.

(*o*) *Wright* v. *Row*, 1 Br. C. C. 61; *Barrington* v. *Hereford*, cited *ibid.*

In *Kennell* v. *Abbott*, 4 Ves. 810, 811, Sir *R. P. Arden*, said, "It was long doubted, whether if an estate was devised charged with legacies, which failed from the nature of the legacies, as if they were charitable legacies, the devisee was entitled to so much as consisted of those legacies. In *Barrington* v. *Harris*, in which the question arose, Lord *Bathurst* at first thought the heir entitled upon *Cruse* v. *Barley*, 3 P. Wms. 20, and *Arnold* v. *Chapman*, *ante*, p. 207, but afterwards his lordship changed his opinion, and determined, and it is now perfectly settled, that if an estate is devised, charged with legacies, and the legacies fail, no matter how, the devisee shall have the benefit of it, and take the estate."

The testator wrote a letter to the devisee, whereby, after reciting the devise to her in the words of the will, in pursuance of his said power, and in confidence of the trust he reposed in her by his said will, he declared it was his will, and desired her, either by sale or mortgage, or otherwise, as to her should seem meet and convenient, to raise so much money as would be sufficient to discharge not only his just debts and legacies bequeathed in his will, and charged upon his said estate, and also the several sums following, to the several persons and for the several uses in the manner hereinafter mentioned. Then he gave several sums to charitable and superstitious uses to the amount of about 6000*l.* On a question whether the void legacies should go to the heirs-at-law as a resulting trust, or sink into the estate for the benefit of the devisee, it was held, that the void legacies sunk into the estate for the benefit of the devisee (*p*).

Lord *Eldon* observed, that all the cases of charities in which the gifts rendered void by the statute did not go to the heir, seem to have been decided on one or other of these grounds, that the heir-at-law was completely disinherited—or that his claim was barred under an intention of the testator, express or clearly implied, and his lordship refers the decision in *Jackson* v. *Hurlock*, to the first of those principles;—in which it was argued, that the heir ought to have had the sum given to charitable uses, as the estate was given to the devisee subject to the payment; but the court rightly said, the testator gave the devisee the whole interest in the land, reserving only a power of appointment, and if he abstained from appointing, or made an appointment which was void, he did not diminish the whole interest which was given to the devisee, and the heir was altogether disinherited. That points to the very distinction noticed by Lord *Camden* in the case of *Gravenor* v. *Hallum* (*q*), where the estate was given to the devisee, subject to a certain rent-charge which he created by his will, severing the rent-charge from the

(*p*) *Jackson* v. *Hurlock*, 2 Eden, 263.

(*q*) *Ante*, p. 208.

devise, and thereby manifesting an intention that it should not go to the devisee, and the uses being void, the rent-charges went to the heir-at-law. That was Lord *Northington's* decision; and the decision in *Barrington* v. *Hereford* (*r*), proceeded upon the same principle (*s*).

Where a testator gave unto the minister or clergyman for the time being of a parish, an annuity to be issuing out of a particular real estate, upon trust to apply the same in instructing poor boys of the parish, with power of distress in case of non-payment; and then devised the estate, subject to the rent-charge, to trustees in fee, in trust to pay the rents thereof to a person for life, and after his decease, in trust to apply a sufficient part of the rents for the maintenance of his two nephews, until their respective ages of 24 years, and when they should have attained their respective ages of 24 years, the testator devised the estate (subject for ever to the said rent-charge,) unto them, as tenants in common in fee. The testator then gave the remainder of his *real* and personal estates, not by him *thereinbefore disposed of*, to his trustees, in trust to sell, and to apply the same equally amongst certain parties. The rent-charge for the charity being void by the mortmain act, 9 George II. c. 36, on a question whether it went to the *residuary* devisees under the will, or to the *specific* devisees of the premises on which it was charged; it was *decided*, that it should sink for the benefit of the *specific* devisees the *nephews*, as part of the produce of the premises devised to them; as the testator appeared to have expressly excepted the annuity out of the residue of his estate, and could never have had it in contemplation, that it should in any case go to the residuary devisees (*t*).

(*r*) *Ante*, p. 210.

(*s*) *Tregonwell* v. *Sydenham*, 3 Dow, 213, 214.

(*t*) *Baker* v. *Hall*, 12 Ves. 497. It does not appear easy to reconcile this case with some decisions which have already been stated, see *ante*, pp. 206—209, and the reason assigned by the court for excluding the *general* residuary devisees, would apply with equal force to the *specific* devisees, and let in the right of the heir-at-law, who does not, however, appear to have been before the court.

Where copyhold land was devised in fee, upon condition that the devisee within one month, would pay 2000*l.* to his executors, to be taken as part of his personal estate, and then gave the residue of it for charitable purposes, the testator having left no customary heir, and no next of kin, it was held, that the devisee who had been admitted, took the land subject to the payment of the 2000*l.*; that the lord of the manor was not entitled to it, because he takes only *propter defectum tenentis*, but that the crown took the 2000*l.* by force of its prerogative if personal estate (*u*), because there was no next of kin; and if real estate, *because there was no customary heir* (*v*). But this decision was reversed on appeal (*w*) to Lord *Brougham*, who held that the devisee took the estate discharged from the legacy, which could not be raised without the aid of a court of equity, to which the crown was not entitled (*x*), although the costs of all parties were directed to come out of the 2000*l.*

Where a testator directed leaseholds to be sold, and gave the produce thereof after payment of debts and legacies to the Society for the Propagation of the Gospel, the executors having been excluded from taking any beneficial interest by the legacies which were given to them, and no relations of the testator being found, it was held that the executors were as much trustees of the money arising from the sale of the leaseholds for the crown, as they would have been for the next of kin if any could have been discovered (*y*).

Testator after devising real estates to be sold, and giving several legacies, and two sums of 100*l.* each for the poor of two parishes, all to be paid out of the monies arising from such sale, directed the residue of such monies to be invested for the benefit of two legatees, and gave the general residue of his estate both real and personal to two other legatees, the two charitable legacies of 100*l.* each being void by the

(*u*) Com. Dig. Administrator (A).

(*v*) *Henchman* v. *Attorney General*, 2 Sim. & Stu. 498.

(*w*) 5 Aug. 1834.

(*x*) See *Walker* v. *Denne*, 2 Ves. jun. 169.

(*y*) *Middleton* v. *Spicer*, 1 Br. C. C. 201. See *Barclay* v. *Russell*, 3 Ves. 424. 1 Will. IV. c. 40.

statute of 9 Geo. II. c. 36; it was held, that they sunk into the general residue not specifically bequeathed (*z*).

A testator made a general bequest of leasehold property, upon condition that the legatee should assign a certain leasehold estate, part of the property, to a charitable purpose. The next of kin claimed the leasehold given to the charity as the trust was void. But it was held to be the same thing as if the illegal condition had been to pay a sum of money to a charity; and it being clear in such a case that the legatee would have retained the whole leasehold property without payment of the sum of money, therefore he must retain the whole without the assignment of a part (*a*).

A leasehold house bequeathed specifically to trustees for a charity which failed, was held to fall into the general residue, and to pass under a general bequest of the residue of the testator's estate and effects not thereinbefore particularly disposed of, and to belong to the legatees and not to the next of kin as undisposed of (*b*). For a general residuary clause will pass all which is not sufficiently disposed of as in the case of lapse (*c*).

3. *Questions between real and personal representatives in cases of conversion of real estate.*] Lord *Eldon* declared it to be a clear rule in equity, that where real estate is directed to be converted into personal for a purpose expressed, which purpose fails, either wholly or partially; in the former case, though the estate has been converted, the whole produce of that conversion will still be real estate; and in the latter, as far as the purpose fails, so far the money is to be considered realty, and not personalty. Where a testator means with regard to a particular purpose, to convert his real estate into personal, if that purpose cannot be served, the court will not infer an intention to convert the estate for any other purpose

(*b*) *Shanley* v. *Baker*, 4 Ves 732.

(*z*) *Page* v. *Leapingwell*, 18 Ves. 463.

(*a*) *Poor* v. *Mial*, 6 Madd. 32.

(*c*) *Brown* v. *Higgs*, 4 Ves. 708. See *ante*, p. 115 n. (*k*).

not expressed (*d*). Sir *John Leach* laid down the following principles as the result of the authorities upon the subject of the conversion of real estate into personal.—"Where a devisor directs his real estate to be sold, and the produce to be applied to particular purposes, and those purposes partially fail, the heir-at-law is entitled to that part of the produce, which in the events is thus undisposed of. The heir-at-law is entitled to it, because the real estate was land at the devisor's death; and this part of the produce is an interest in that land not effectually devised, and which, therefore, descends to the heir. It is for this reason, that the produce of an estate which the devisor directs to be sold, can never be strictly part of his general personal estate. If a devisor directs such produce to be paid to his executors, and applied as part of his personal estate, the executors take it as devisees. Every person taking an interest in land directed to be sold, is in truth a devisee, and not a legatee (*e*). A devisor may give to his devisee either land, or the price of land, at his pleasure; and the devisee must receive it in the quality in which it is given, and cannot intercept the purpose of the devisor. If it be the purpose of the testator to give land to the devisee, the land will descend to his heir, if it be the purpose of the devisor to give the price of land to the devisee, it will like other money, be part of his personal estate. Under every will, when the question is, whether the devisee or the heir, failing the devisee, takes an interest in land as land or money, the true inquiry is, whether the devisor has expressed a purpose, that in the events which have happened, the land shall be converted into money?" and accordingly as that question is answered, the devisee or the heir standing in his place, will take the devised interest in the quality of money, or of land (*f*)

Properly speaking, nothing is the personal estate of a tes-

(*d*) *Hill* v. *Cock*, 1 Ves. & B. 174, 175; *Green* v. *Jackson*, 5 Russ. 39. On the conversion of real into personal estate, see 1 Rop. on Leg. 432—475, 3rd ed.

(*e*) See *Page* v. *Leapingwell*, 18 Ves. 463; *Gibbs* v. *Ougier*, 12 Ves. 415.

(*f*) *Smith* v. *Claxton*, 4 Madd. 492. See *Ashby* v. *Palmer*, 1 Mer. 301.

tator that was not so at his death, although he may so express himself as to shew that something else was intended; but where there is nothing but a direction to sell land, with an application of the money to a particular purpose, and a subsequent bequest of the rest and residue of the personal estate, there seems to be no case in which it has been held, that the surplus after the particular purpose is answered, forms part of the personal estate, so as to pass by the residuary bequest (*g*).

In *Durour* v. *Motteux* (*h*), the testator gave all his estate consisting of a freehold and some leasehold, monies, securities, &c., upon trust to sell and dispose of all his freeholds, leaseholds, monies, &c., and all he had or might have of what kind soever, or wheresoever, and after payment of all his debts, funeral expenses, and legacies, to place out all the residue of his personal estate at interest upon government or other securities upon trust, for the benefit of the persons therein mentioned. The testator then gave several legacies, some to individuals, and the sum of 12,000*l.* for charitable purposes, and the remainder of his estate and the interest therein being placed out at interest in some of the funds, the testator gave for the benefit of the persons therein named, and their children. On a question whether the legacy of 12,000*l.* which was void under the mortmain act, should go to the heir-at-law or to the residuary legatee, Lord *Hardwicke* being of opinion that the money to arise by the sale of the real estate was turned into personalty by the will, and that the testator intended, by the description of *all* his personal estate, to include the whole in the residue, held, that the bequest of it included as well void, as lapsed legacies, and passed them to the residuary legatee. His lordship added, the case comes to this; a will is made, in which several legacies and the residue of the personal estate are given away; one of the personal legacies *void by law*;

(*g*) *Maugham* v. *Mason*, 1 Ves. & B. 416.

(*h*) 1 Ves. sen. 320, stated from Reg. Book; 1 Sim. & St. 292 n.

(d). See 8 Ves. 25. See 1 Mylne & K. 661; *Green* v. *Jackson*, 5 Russ. 35; *post*. p. 224.

the court cannot say for that reason, contrary to the express will, that he intended to die intestate; for giving the residue over includes every thing, whether falling in by reason of that legacy being void, or lapsing by the death of the legatee in the testator's lifetime. In *Maugham* v. *Mason* (*i*), Sir *William Grant*, M. R., said, that it was difficult to ascertain from what expressions Lord *Hardwicke* inferred in *Durour* v. *Motteux*, that by the description of all his personal estate, the testator meant to include every thing in the residue, but that decision is generally accounted for by the particular manner in which the sale was directed, and the circumstance of the testator's having blended together the real and personal estates in one gift to trustees to sell the whole with his personal estate, &c. (*j*).

Where a testator directs his real and personal estate to be converted into money, and the mixed fund to be applied to certain stated purposes, and some of those purposes fail by lapse or otherwise, questions have arisen, whether the remaining purposes, which are in their nature primary charges upon the personal estate, are to be satisfied out of that estate as far as it will extend in exoneration of the real estate for the benefit of the heir, or whether the remaining purposes are to be satisfied out of the real and personal estate *pro ratâ?*

Sir *John Leach*, M. R., said, "It is a question of intention; and it must be admitted, that in order to throw upon the real estate any part of the burthen to which the personal estate is primarily liable, the intention of the testator must be manifest. When a testator creates from real and personal estate, a mixed and general fund, and directs the whole of that fund to be applied for certain stated purposes, he does in effect direct that the real and personal estates which have been converted into that fund, shall answer the stated purposes, and every of them *pro ratâ*, according to their respective values. If any of those purposes fail, then the part of the fund which according to the intention of the testator

(*i*) 1 Ves. & B. 417. *post*, pp. 222, 223, 224.

(*j*) See 1 Br. C. C. 500; 3 *Id.* 143;

would otherwise have been applicable to those purposes, is undisposed of. As far as this part of the fund has been composed of real estate, the heir is to have the benefit of it, as so much real estate undisposed of; and as far as this part of the fund has been composed of personal estate, I am of opinion that it is personal estate undisposed of for the benefit of the next of kin; and in order to ascertain the proportion which will thus belong to the heir and next of kin respectively, it must be referred to the Master to compute the respective values of the real and personal estate which are thus blended by the testator in one common fund" (*k*).

Where charitable legacies were declared to be void, so far as they were charged upon real and leasehold estates, and such part of the personal estate as was out on mortgage, it was declared that the heir-at-law was entitled to such part of the real estate, or of the money to arise by the sale thereof, as would have been applied in satisfaction of the said two legacies, in case they had not been void, except there should be a deficiency in the funds provided by the testatrix for payment of her *other* legacies; in which case the consideration was reserved how the said part of the real estate, or the money to arise by the sale thereof, should be ultimately disposed of; and it was declared that such part of the leasehold estates, or of the money to arise by the sale thereof, and the said money due upon mortgage, as would have been applied

(*k*) *Roberts* v. *Walker*, 1 Russ. & M. 752. The decree ordered the Master to apportion the legacies (except the charitable legacies), funeral expenses and debts of the testator, and also the costs of the suit up to and including his further report, between the testatrix's real and personal estate in proportion to their respective values; for which purpose he was to set a value on the real estate and the outstanding personal estate (if any), and reserved the consideration how the proportion to be borne by the real estates, and any and what interest therein were to be raised, and it was ordered that the rents of the real estate should be received by heiress-at-law; and it was declared, that the heiress-at-law was entitled to the undisposed surplus of the freehold and copyhold estates, and that such estates were liable to a rateable proportion with the personal estate of the sums charged by the testatrix on the mixed fund, Reg. lib. 1829, B. fol. 2355, 1 Russ. & M. 767.

in satisfaction of the said charity legacies, if they had not been void, would form part of the funds provided for payment of the other legacies. On the cause coming on for further directions, the question was, whether the proportion of the fund produced by the real estate, which would have been applied in satisfaction of the charity legacies, should go to the heir-at-law, or to supply the deficiency of assets for the other legacies. The court held, that as the testatrix had converted all her real and personal property into an aggregate fund, the whole liable to every legacy, had made the produce of her real estate, where it was not well disposed of, liable to all legacies well given, as by the general law personal estate, forming an interest in land, was liable to all legacies, except those given to a charity, and therefore that the fund arising from the real estate was liable to the other legacies (*l*).

In *Paice* v. *The Archbishop of Canterbury* (*m*), the testatrix gave all her real and personal estates to trustees, "in trust, for the following purposes," which were for the payment of debts and legacies, and then for charitable uses. One question was, whether the money produced by the sale of the leaseholds and freeholds was liable to any part of the debts, legacies, and costs; and it was held, that the freehold estate was not to be burthened with any of the debts or legacies, or of the costs of the suit, except such as related to the real estate.

In *Howse* v. *Chapman* (*n*), a testator directed a share in the *Bath* Navigation, and various descriptions of personal property, to be sold, and the proceeds of the sale to be applied in paying his debts and legacies, and he gave the remainder to a charitable purpose. The decree at the hearing declared that the Navigation share descended to the heir-at-law; and, by the decree on further directions, the personal estate exclusively was directed to be applied in payment of the testator's debts and legacies.

(*l*) *Currie* v. *Pye*, 17 Ves. 462. 1 Russ. & M. 759.
(*m*) 14 Ves. 364. See the decree, (*n*) 4 Ves. 542.

It was established by the case of *Ackroyd* v. *Smithson* (*o*), that where a testator directs his real estate to be sold, and the mixed fund arising from the produce of the real estate and the personal estate to be applied to certain specified purposes, if any part of the disposition fails, either by lapse or otherwise, then to the proportional extent in which the real estate would have contributed to that disposition, it is to be considered as failing for the benefit of the heir-at-law, and as so much real estate in that event undisposed of. Where the whole land is properly sold by the trustees, and there is only a partial disposition of the produce of the sale, there the surplus belongs to the heir as money, and not as land (*p*).

Where lands are directed to be sold, and part of the money to arise therefrom is given for charitable purposes, the heir-at-law, and not the residuary legatee of the testator, will be entitled to so much of the money as is ineffectually given for those purposes, unless there was a complete conversion, and it can be inferred from the will that the testator intended the legacies which failed should be included in the gift of the residue. Thus where a testatrix, having given certain parts of her household goods to her executors, to be disposed of as they or the survivor should in their discretion think proper, devised her freehold, copyhold, and leasehold estates to her executors, their heirs, executors, administrators and assigns, upon trust, to sell, and out of the money to arise by such sale and her other effects, she bequeathed several legacies, and one to each of her executors for their care and trouble. The testatrix then gave all "the rest and residue of the monies arising from the sale of her said estates, and all the residue of her personal estate, after payment of her debts, legacies, and funeral expenses, unto her said executors, to be disposed of unto such person and persons, and in such manner and form, and in such sum and sums of money as they, in their discretion should think proper; and declared her will to be,

(*o*) 1 Br. C. C. 503; *Cruse* v. *Barley*, 3 P. Wms. 22, and n. by Cox.

(*p*) *Smith* v. *Claxton*, 4 Madd. 484; *Dixon* v. *Dawson*, 2 Sim. & Stu. 340.

that in case her said freehold, copyhold, and leasehold and personal estates, therein before mentioned, should fall short or not be sufficient for payment of all the said several legacies and bequests, sum and sums of money thereby given and bequeathed, that what should fall short should be proportionably abated out of each legacy thereby given." The personal estate having been insufficient to pay the debts, the real estate had been sold, and the questions were, first, whether the executors, or the heir-at-law, or the next of kin of the testatrix, were entitled to the surplus arising from the sale of the real estate; secondly, who was entitled to the sum of 530*l.*, the amount of the charitable legacies, admitted to be void by statute 9 Geo. II. c. 36. The court held it clear, that such part of the real estate as was given to charitable purposes belonged to the heir-at-law, and did not go to the next of kin or the residuary legatee; but that neither the heir-at-law nor the next of kin had any right to call upon the executors to account for the residue, which was not otherwise disposed of than by the residuary clause, which was held not to have imposed any trust, but to have given at least a general power of appointment (*q*).

Again, where a testatrix devised all her real and personal estates to trustees, their heirs, executors and administrators, upon trust, in certain events which happened, to sell the same, and out of the monies to be produced by the sale to pay certain legacies, and then to lay out the sum of 800*l.* in the purchase of landed property, which was to be conveyed and settled so that the rents thereof might be applied for ever for the benefit of certain charitable institutions mentioned in the will; and to pay all the remainder of the monies to arise from the sale of the real estates to J. R., for his own use and benefit; the testatrix then disposed of her personal estate by giving several legacies, and bequeathed the residue to J. R., for his own use. The estates having been sold, in a suit instituted by the personal re-

(*q*) *Gibbs* v. *Rumsey*, 2 Ves. & B. 294. See *Crosbie* v. *The Mayor of Liverpool*, 1 Russ. & M. 761— 763 n.; *Green* v. *Jackson*, 5 Russ. 35; *post*. p. 224.

presentatives of the testator's heir-at-law against the trustees and J. R., claiming the legacy of 800*l.*, on the ground that it was void as to the charitable uses, Sir *John Leach*, V. C., said, the will, as to personal estate, speaks at the time of the death of the testator, and the residuary legatee takes not only what is undisposed of by the expressions of the will, but that which becomes undisposed of at the death, by disappointment of the intentions of the will. It is otherwise as to the residuary devisee of real estate, or of the price of real estate. As to him, the will speaks only at the time of making it, and he can take nothing but what is at that time intended for him (*r*). The devisor, at the time of making the will, intended that the residuary devisee of the price of the land should take such residue, subject to the deduction of the 800*l.* and not the 800*l.*, which is therefore undisposed of, and results to the heir. In *Durour* v. *Motteux* (*s*), the devisor included the residuary price of his land in the general gift of all his personal estate; and therefore it was contended that it was the purpose of the testator that it should pass as his residuary personal estate would do (*t*).

As a testator may, if he pleases, direct that the produce of his real estate, which he orders to be sold, shall in all events and for all purposes be considered as if it had been personal estate at his death; questions have arisen, where there is no express declaration of such intention on the part of the testator, whether that intention is or not to be collected from the whole will. Some regret was expressed by Sir *John Leach*, M. R., that a rule had not been established that such intention was never to be inferred without the testator's express declaration to that effect; but it is

(*r*) By a bill for amending the laws with respect to wills, now in Parliament, it is proposed to alter the above rule of law by an enactment, "that every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

(*s*) *Ante*, p. 216.

(*t*) *Jones* v. *Mitchell*, 1 Sim. & Stu. 290.

settled by the authorities, that in each particular case the court must form its conclusion upon that point from the whole will (*u*).

Where a testatrix, after devising her freehold and copyhold estates to trustees for sale, used the following expression: "I will and direct, that the monies to arise from such sale be considered and taken as part of my personal estate;" and in a subsequent part of the will used these words, "And I do hereby will and direct, that out of the monies to arise by such sale, and out of all *other* my personal estate, the several legacies hereinafter mentioned, be paid and satisfied." And the residuary clause in her will began as follows: "And all the residue of my personal estate, and of the monies arising from the sale of my real estates I give and bequeath," &c. &c. Some of the legatees having died in the testatrix's lifetime, on a question whether the real estate was absolutely converted into personalty, so that lapsed legacies fell into the residue, or whether the conversion was partial only, so that such legacies belonged to the heir; Sir *John Leach*, V. C., said, "The two first passages purported an intention that the monies should be considered as of personal estate at her death; but the latter passage pointed the other way; and it was only from deference to the cases of *Durour* v. *Motteux* (*v*), and *Mallabar* v. *Mallabar* (*w*), that his Honour arrived at the conclusion, that the testatrix had in her view the improbable intention that the monies arising from the sale of her real estate should, for purposes not foreseen by her, have the same qualities as if at her death they had been part of her personal estate." But Lord *Brougham*, upon appeal, decided in favour of the heir (*x*).

(*u*) *Jessopp* v. *Watson*, 1 Mylne & K. 665; *Phillips* v. *Phillips*, *Id.* 659.

(*v*) 1 Ves. sen. 320; 1 Sim. & Stu. 292 n.; *ante*, p. 216. See 1 Mylne & K. 661.

(*w*) Ca. temp. Talbot, 78. See 1 Mylne & K. 659.

(*x*) *Amphlett* v. *Parke*, 1 Sim. 275; *S. C.* 4 Russ. 75; 1 Mylne & K. 660 n. (a). There was an appeal to the House of Lords in this case, but before it was heard, the heir and residuary legatee compromised the matter by dividing the fund in question between them.—See 1 Mylne & K. 653, note (a).

Where a testator devised his freehold and copyhold estates to his executors, upon trust for sale, and declared his will to be, that the monies which should arise from the sale of his freehold and copyhold estates, should be deemed to be part of his personal estate; and that the rents and profits of his said estates until sale, should after his decease be deemed part of the annual income of his personal estate, and should be subject to the dispositions thereinafter made concerning his personal estate, and the income thereof. And touching the produce of his freehold and copyhold estates, goods, chattels, stock in trade, debts, and all other his personal estates whatever, he directed his executors to convert the whole into money, and pay thereout all his debts, funeral expenses and legacies; and the residue and remainder of his personal estate and of the produce of his freehold and copyhold estates, when converted into money, he gave in equal shares to five persons named: one fifth share having lapsed by the death of one of the legatees, it was held by Sir *John Leach*, M. R., that the property was absolutely converted, and that the testator's heir-at-law was excluded from any share of the residuary estate, by the next of kin (*y*).

Where real estates were devised to three trustees, and the produce thereof, together with his personal estate, directed to be applied in payment of his debts and legacies, and amongst others of several charitable legacies, and the residue of the monies which should remain in the hands of his trustees, who were also named his executors, after full satisfaction and discharge of the aforesaid several payments and bequests, was directed to be divided between certain persons described in his will. It was contended, that the heir-at-law was entitled to so much of the legacies as would have fallen upon the produce of the real estate: but Sir *John Leach*, M. R., upon the authority of *Durour* v. *Motteux* (*z*) held, that the failure of the charitable bequests enured to

(*y*) *Phillips* v. *Phillips*, 1 Mylne & K. 649.

(*z*) *Ante*, p. 216.

the benefit of the residuary legatees, and that no distinction could be made between that part of the residue which had arisen from the real estate, and that part which had arisen from the personal estate (*a*).

It follows as a consequence, from the principle in equity, that what is agreed to be done is, to many intents, considered as done; that money, agreed or directed to be laid out in the purchase of land, is for many purposes considered as *real estate;* but this rule will not apply if the *special purpose* for which the conversion is directed to be made, fail (*b*).

Therefore where legacies are directed to be laid out in the purchase of land for the use of particular charities, which are void, the court will not declare them void as to the charity, and good as to the purchase of land, nor direct a purchase to be made for the purpose of giving a resulting trust to the heir-at-law, but the bequest is treated as totally void, as if it had not been inserted in the will; for the trust must take effect according to the whole intent or not at all; and it was said by the court, as all money arising from the sale of real estate was still accounted of that quality, so lands to be purchased with personal estate were still to be considered as part of the personal estate (*c*).

4. *Release from next of kin not presumed.*] In a case where there were no circumstances to raise a presumption that the next of kin had released their right to a residue given to charitable uses, void by the statute of mortmain, a decree was made in their favour thirty-five years after the testator's death; not, however, on the ground that a presumption will not be made in favour of a charity, where the facts will war-

(*a*) *Green* v. *Jackson*, 5 Russ. 35.

(*b*) *Cruse* v. *Barley*, 3 P. Wms. 20; *Mallabar* v. *Mallabar*, Cas. temp. Talb. 79; *Robinson* v. *Taylor*, 2 Br. C. C. 589; *Spink* v. *Lewis*, 3 Br. C. C. 355; *Walker* v. *Denne*, 2 Ves. jun. 170. See 1 Fonbl. Eq. 420—422; 1 Sand. on Uses, pp. 298—304, 4th ed.

(*c*) *Mogg* v. *Hodges*, 1 Cox, 9; *S. C.* 2 Ves. sen. 52; 1 Coll. Jur. 442. See *Chapman* v. *Brown*, 6 Ves. 404; *ante*, p. 201.

rant it. Thus a testator, having died in 1757, and by his will and a codicil thereto given the residue of his personal estate, consisting partly of mortgages on real estates, to trustees for such charitable uses as they should think fit, who conceiving that it was applicable to such purposes, applied the interest and part of the principal in erecting a charity-school; and, in 1792, one of the next of the kin of the testator filed a bill, for the purpose of having it declared that the disposition of so much of the testator's estate as consisted of real securities was void, and for a distribution of it. It was referred to the Master, to take an account of the testator's personal estate; to distinguish such part as was secured by mortgage or other securities, at his decease; to inquire who then were his next of kin, their ages, and where they resided, and who were their personal representatives; and whether any part of the testator's estate had been applied in the charities directed by the will and codicil; and whether the next of kin had any notice of the will, and when first, and whether they received their legacies under it; and whether they or any of them released or relinquished, in any manner, their shares of the residue (*b*).

Upon the Master's report, the special circumstances affording no presumption of a release by the next of kin, and an issue having been declined, it was declared, that the plaintiffs were entitled to such part of the personal estate of the testator as existed upon real securities at the time of his death, with interest from the time of filing the bill, the costs to come out of the general fund (*c*).

Mortgage securities, forming part of a residue given to charitable uses, will be decreed to the next of kin, although one of them had disclaimed having any interest in the residue, and being desirous of having the charitable bequests established, had assigned all her interest in the mortgages and such residue to the trustees of the charity for the benefit of it (*d*).

(*b*) *Pickering* v. *Lord Stamford*, 4 Br. C. C. 214.

(*c*) *S. C.* 2 Ves. jun. 581; 3 Ves. 332, 492.

(*d*) *Attorney General* v. *Earl of Winchelsea*, 3 Br. C. C. 376, 381.

A case is mentioned in the *Attorney General* v. *Graves* (*e*), in which it is said, as there was an agreement with the heir-at-law, there was nothing for the consideration of the court on the question of a charity; for if an heir-at-law will confirm a devise of land to charity, the court will not take it away, for it becomes the act and deed of the heir; but in order to make a confirmation by the heir effectual, it is conceived, that the requisites of the statute 9 George II. c. 36, must be complied with, and that the conveyance or confirmation by the heir would be void, unless he lived twelve months after its execution; his act must be taken as the original gift, and subject to the same rules as any other conveyance to charitable uses.

SECTION VII.

Assets not marshalled in favour of Charities.

1. *Decisions as to marshalling assets in cases of Charities*, p. 227.
2. *As to the apportionment of a mixed fund for the payment of Debts and charitable and other Legacies*, p. 234.

It is a general principle of equity, that if a claimant has two funds to which he may resort, a person having an interest in one only, has a right to compel the former to resort to the other; if that is necessary for the satisfaction of both (*f*). This principle is not confined to the administration of the estate of a person deceased, but applies wherever the election of the party having two funds, will disappoint the claimant having the single fund; and accordingly, a court of equity will, if necessary, control that election, and compel the one to resort to that fund, which the other cannot

(*e*) Ambl. 157.

(*f*) *Aldrich* v. *Cooper*, 8 Ves. 388.

reach (*b*). This rule extends to legatees; thus, where a specialty creditor, who has a general lien on the real estate, as a creditor by bond in which the debtor bound himself and his heirs, receives satisfaction out of the personal estate, and thereby exhausts it so as to leave nothing for the payment of legacies, a legatee shall stand in the place of such specialty creditor, as against the real assets, which have descended to the heir (*c*).

A legacy given to charitable uses payable out of pure personal estate, that is, out of such parts of it as have not arisen from mortgages or other interests, or incumbrances affecting real estates, is valid (*d*). It has been already shewn that bequests of leaseholds, money due on mortgages whether in fee or for a term of years, or charged on, or to arise from the sale of real estate, to charitable uses, are void (*e*).

1. *Decisions as to marshalling assets in cases of charities.*] Where testators being possessed of pure personal estate, and of money arising from mortgages, and other interests or incumbrances affecting real estate, have given the residue of their estates or particular legacies, to charities; questions have often arisen whether the assets should be marshalled, by throwing all the debts and other legacies in the first instance, upon those interests which cannot lawfully be charged in favour of charities, in order that the pure personal estate may go in satisfaction or augmentation of the charitable bequests.

The court does not appear to have marshalled the assets in favour of a charitable gift, where the *residue* was given to charitable uses, and the real estate was charged with the payment of debts and legacies generally.

(*b*) *Attorney General* v. *Tyndall*, Ambl. 615. See 2 Fonbl. Eq. 286—301; Ram on Assets, 329—355.

(*c*) *Bowaman* v. *Reeve*, Pr. Ch. 578; *Lutkins* v. *Leigh*, Cas. temp. Talb. 53; *Hanby* v. *Roberts*, Ambl. 128; *S. C.* Dick. 105; *Aldrich* v. *Cooper*, 8 Ves. 396.

(*d*) *Sorresby* v. *Hollins*, 9 Mod. by Leach, 221; *ante*, pp. 183—185.

(*e*) *Ante*, pp. 154—168.

In *Arnold* v. *Chapman* (*f*), the facts of which have been already stated, it was contended, that the assets ought to be marshalled in favour of the charity, on the ground that a testator might say, that he charged his real estate with debts and legacies, and gave his personal estate to a charity. Lord *Hardwicke* said, possibly that might do, although it would go a great way towards overturning the mortmain act; but as to that he would not give an opinion, for in such a case the testator appears to have an intention of exoneration (*g*). The rule of the court as to marshalling assets, must be taken to be the same as it was before the statute, and if a legacy was given and debts charged on real and personal estate, the rule then was, that the debts should be paid out of the real, and the legatees should come on the personal; but there was no rule that where real and personal estate is charged, and the residue given to a legatee; the court would in such case, turn the charge on the real, to give the whole personal estate to the legatee.

As the personal estate is the proper fund for payment of debts, if an heir-at-law is sued upon a specialty, he may go into a court of equity and be reimbursed out of the personalty; but where a testatrix, after subjecting her personal estate to the payment of her debts and legacies, gave the *residue* of her personal estate and of the money to arise from the sale of her real estate, which was directed to be sold for charitable purposes, the court would not lay all the debts and other legacies on the real estate, in order that all the personal estate might be applied to the charities (*h*). So where a testatrix devised her real and personal estate, after payment of her debts, funeral expenses and charges of prov-

(*f*) 1 Ves. sen. 110; *ante*, pp. 206, 207.

(*g*) See *Dixon* v. *Dawson*, 2 Sim. & Stu. 327, in which the validity of a direction by a testator "that certain legacies to charities should be raised and paid out of his ready money, and such part of his personal estate, as by law he could charge with the payment thereof," was not questioned.

(*h*) *Mogg* v. *Hodges*, 1 Cox, 9; *S. C.* 2 Ves. sen. 52.

ing her will, to be disposed of, and gave a legacy to the Corporation of the Sons of the Clergy, and the residue to *Christ's* Hospital, the court refused to marshal the assets by throwing the debts upon the real estate, in order to leave the personalty clear for effecting the charitable legacies (*i*).

But in some early cases, a distinction was made between the gift of a *residue* and a *particular* legacy to charitable uses; and, in the latter case, if the real estate was made liable to the payment of debts and legacies as an auxiliary fund, and the personal estate was not sufficient to pay the whole, a legacy to a charity was ordered to be paid out of the personal estate, and the debts and other legacies out of the real. Thus where a testator gave all his real estate to trustees, in fee, in trust, to sell and to pay the monies to arise by such sale and the rents in the mean time, as he had thereafter bequeathed the same, and then gave certain legacies and a sum of 1000*l.* to be laid out by trustees as a fund for charitable uses; and declared his mind to be that his debts, funeral expenses, and legacies should be paid out of his personal estate, if the same should be sufficient, but if not, that such deficiency should be made good out of the monies to arise from the sale of his real estate, and gave the residue of his estate to charities. It was declared that the devise of the surplus of the real estate, or of the monies to arise by the sale thereof, was void by the statute 9 Geo. II. c. 36; and that in case, after payment of the debts, funeral and testamentary expenses and legacies, there should remain any surplus of the testator's personal estate, then that such surplus should be applied to the charitable purposes declared by the will; but if the personal estate was not sufficient to pay debts, funeral expenses, and legacies, that the legacy of 1000*l.* and the interest given, in trust, to be laid out and settled as a fund for charitable uses, ought to be satisfied entirely out of the personal estate, as far as the same would extend; and that the residue of the testator's debts and other

(*i*) *Foster* v. *Blagden*, Ambl. 704.

legacies, and the interest thereof, ought to be raised and paid out of the real estate (*k*).

So where a testator by his will charged his real estate with the payment of his debts and legacies, except three legacies for charities, which he directed to be paid out of his *personal* estate, Lord *Northington* decreed, the charity legacies to stand in the place of the specialty creditors, for what they should exhaust of the personal estate (*l*).

The bounty of a testator enables legatees to require assets to be marshalled, and therefore if such creditors as have a right to resort to the real estate *descended* will go to the personal estate, the choice of the creditors will not determine whether the legatees shall be paid or not (*m*).

Lord *Hardwicke* adopted a similar principle in marshalling assets, in cases where leaseholds for years or mortgages were bequeathed to charities, considering the property as undisposed of and belonging to the next of kin, and in the same light as land descending to an heir-at-law, which was applied for the benefit of a particular devisee in payment of a mortgage debt secured on the lands devised.

Thus where a testator, who was possessed of a lease for years but not of any real estate, after directing the payment of his debts and legacies, gave the residue of his estate for charitable purposes; and the question was, whether the leasehold should be first applied in payment of debts and legacies. Lord *Hardwicke* said, where there are general legacies charged on real estate, and the personal estate is insufficient to pay the whole, the legacy to the charity shall be paid out of the personal estate, and the rest out of the real. So where there is a particular disposition of the different species of estate, enumerating them, and in the devise of the residue one of them is left out, that part shall be applied first. So when there is a charge on the real estate and part of it is left undisposed

(*k*) *Attorney General* v. *Lord Weymouth*, Ambl. 20, 25, n. (11). See *Mogg* v. *Hodges*, 1 Cox, 12, 2 Ves. jun. 52.

(*l*) *Attorney General* v. *Lord Mountmorris*, 1 Dick. 379.

(*m*) *Aldrich* v. *Cooper*, 8 Ves. 396.

and descends, that part shall be first applied (*n*). His lordship said that the same rule must apply in the principal case; for though the court would not set up a new rule of marshalling assets in order to defeat the statute of mortmain, yet the old rules ought to be applied as before that statute. The bequest of the residue being good, except as to the leaseholds, which went to the next of kin, it was held that the charitable legacy ought to be paid out of the residue of the personal estate exclusive of the leaseholds, and that the leaseholds should be first applied in the payment of debts and legacies, as a real estate descending would before that part which is devised (*o*).

In the *Attorney General* v. *Caldwell* (*p*), where a testator gave the residue of his estate naming "mortgages" to charities, on the question whether a mortgage for years should be applied in the first place in payment of the debts, the court distinguished between a case where a mortgage was given specifically, and where it passed by the residuary bequest, enumerating it amongst the different species of estates of which the residue consisted; and held, that in the former case it could not be first applied to pay debts, but in the latter it might, and accordingly gave directions that the mortgage should be first applied.

Where a testator devised the residue of his real and personal estate to charitable uses, which was declared to be void, so far as related to a term of years, whereof he was possessed as lessee. On the question of marshalling the assets, Lord *Hardwicke* said, that he should not set up a new rule for the benefit of charities, but they might have the benefit of the old rule. When there are general legacies, and the testator has charged his real estate with payment of all his legacies, if the personal estate is not sufficient to pay the whole, the court has said, the legacy to the charity should be paid out of the personal estate, and the rest out of

(*n*) *Galton* v. *Hancock*, 2 Atk. 430.

(*o*) *Attorney General* v. *Tomkins*, Ambl. 216, and n. by Blunt.

(*p*) Ambl. 635; *ante*, p. 157.

the real estate; that the will of the testator may be performed *in toto*. The court declared the bequest of the leasehold estate to the charitable uses void, and consequently that the same was to be considered as part of the personal estate undisposed of by the testator, and that the same was in the first place applicable to the payment of the testator's debts and funeral expenses, and that the residue of the leasehold estate belonged to the testator's next of kin, and the produce of the leasehold estate (which was directed to be sold), was declared in the first place to be applicable to the payment of the testator's debts and funeral expenses, and that the residue of the leasehold estate belonged to the next of kin (*q*). The rule adopted in the above cases was first shaken by Lord *Northington*, and may now probably be considered as superseded.

In the case of a specific bequest of a leasehold estate to a charity which was void, it was attempted to give the charity the benefit of the leasehold estate as forming part of a residue which was given to charitable purposes. But Lord *Northington* was of opinion, that the void legacy could not bear a proportion of the debts and legacies in order to augment the general residue for the charity; first, because the words of the statute are negative, that no interest in land shall go to a charity; secondly, because it was the intent of the testatrix, that the trustees should take the leasehold by *specific* devise, and not as part of the residue of the personal estate; and therefore, the clause in the will giving "all the rest and residue of the personal estate to the trustees, to dispose of the same for the charitable purposes aforesaid," must be considered to mean only the residue exclusive of the lands specifically devised; and therefore, consistently with the will and the statute, the charity could at most only take such residue were there no other objection to the devise of such residue (*r*).

(*q*) *Attorney General* v. *Graves*, Ambl. 155, 157, note by Blunt. The same rule was observed in *Negus* v. *Coulter*, Ambl. 367; *S. C.* 1 Dick. 326. See *ante*, p. 154.

(*r*) *Attorney General* v. *Tyndall*, 2 Eden, 207; *S. C.* Ambl. 614. See *Waller* v. *Childs*, Ambl. 526.

In *Hillyard* v. *Taylor* (*s*), a testator gave all his estate, including a descendible freehold in trust, to sell and pay (amongst others), two legacies to charities, and it was decreed, that in case the personal estate should be wholly or in part exhausted in satisfying the debts and funeral expenses, and such of the legacies as were not given to charity, then the legatees of the charitable gifts should stand in the place of the specialty creditors, and receive a satisfaction *pro tanto* out of the real estate, but that decree was afterwards reversed on the authority of *Foster* v. *Blagden* (*t*).

The doctrine of marshalling assets so as to give to charities the full benefit of the pure personal estate, appears to be now wholly exploded as an evasion of the statute 9 Geo. II. c. 36 (*u*). Therefore, charitable legacies are only entitled to be paid out of the pure personal estate, *pari passu*, with the other legacies, and will be defeated as to all which that estate is insufficient to pay, after bearing the proportion of the other charges to which it is liable (*v*).

In *Makeham* v. *Hooper* (*w*), where the fund for payment of legacies arose partly from real estates, and the personal estate was insufficient for payment of general legacies to particular charities, Lord Commissioner *Ashhurst* said, "that he thought they were bound by the recent cases with respect to the question of marshalling; that it did not appear what was the reason of the turn in the cases, but as the decisions had taken that course, they could not alter them."

2. *As to the apportionment of a mixed fund to the payment of debts and charitable and other legacies.*] Although assets will not be marshalled in favour of charitable gifts, yet the Court of Chancery in administering a general residue given for such purposes, consisting partly of mortgages or other interests or incumbrances affecting real estates, will not as between the testator's next of kin who are considered as legatees of such

(*s*) Ambl. 713; S. C. 2 Dick. 475.

(*t*) *Ante*, p. 230.

(*u*) *Foy* v. *Foy*, 1 Cox, 165.

(*v*) *Ridges* v. *Morrison*, 1 Cox, 180.

(*w*) 4 Br. C. C. 156.

interests, and the charities which have a clear right to the pure personal estate, allow a creditor or general legatee to resort exclusively to the assets purely personal, to the disappointment of the charities; but will, where part of a disposition of the residue to charity fails on account of its consisting of mortgages or the produce of real estate, direct, that the respective funds shall be applied to the debts and other charges according to the proportion those funds bear to each other. Thus, where a testator bequeathed all the rest, residue, and remainder of his goods, chattels, personal estate, and effects whatever, not thereinbefore otherwise disposed of, to trustees in trust, to invest in the funds and not on any real security, the dividends to be applied for supporting a school. On an information to establish the charity, one of the next of kin of the testator contended, that the gift of the residue was void so far as it consisted of mortgages and other real securities, and that he was entitled to a distributive share of the residue. Sir *R. P. Arden*, M. R., said, that some cases showed that assets should not be marshalled. He conceived this case to stand upon the same ground as if the testator had specifically bequeathed his mortgages to one person, and the other part of his personal estate to another. In such a case, they should contribute to the payment of the debts and legacies rateably according to the amount of what they took. The next of kin in this case, he considered as if he had been a legatee of the mortgages, and therefore decreed, that the payment of the debts and legacies should be made out of the mortgages, and out of the rest of the personal estate, rateably according to the amount of each of them respectively (*x*).

(*x*) *Attorney General* v. *Earl of Winchelsea*, 3 Br. C. C. 381, n. by Belt; *S. C.* 2 Cox, 364. The decree declared, that the debts, legacies, and costs of the original suit, ought to be paid out of the testator's general personal estate, and out of the monies secured upon mortgage or other real securities *pro ratâ*, (except so far as such costs related to any proceedings to be had respecting the charities in question, under the direction thereafter given for regulating the same), which ought to be wholly paid out of the testator's general personal estate; and that the surplus of the personal estate, exclusive

The rule of contribution adopted in the last case has been followed in several other cases. Thus where there was a specific disposition of real estate by will, in trust, to sell, and in the first place to pay debts, legacies, and the charges of probate and execution of the will, and, in the next place, that the residue should be appropriated to the improvement of the City of *Bath*, the bequest, as to a navigation share, being void and going to the heir-at-law as real estate; and as to money on real securities, as mortgages, turnpike bonds, and commissioners' bonds for the improvement of the City of *Bath* being also void and going to the next of kin, it was held, that the general residue undisposed of was to be first applied to the debts and other charges, and the deficiency to be borne by the personal property that passed to the City of *Bath*, and that of which the disposition failed by the statute of mortmain *pro ratâ* (*y*).

Where a testator gave his real estate and the residue of his personal estate to his executor, upon trust, after the death of his wife, to convert it into money, and after payment of legacies (some of which were to charities), he gave the residue to the Corporation of *Liverpool* on charitable trusts. The executor having sold the real estate, the original decree declared that the bequests of so much of the legacies to charitable uses and the trusts of so much of the residue which was given to charitable uses, as arose from the real and leasehold estates, were void; and it was afterwards referred to the Master to

of such part thereof as should appear to have been secured by mortgage (after bearing the proportion of the testator's debts, legacies, and costs, before mentioned), ought to be applied for the several charitable purposes mentioned in the testator's will, and the surplus be retained by, or paid to the trustees, for the several charitable intents and purposes therein mentioned, and that a scheme be laid before the Master for the application of the charitable funds given by the will. And it was declared, that so much of the personal estate as had arisen from mortgages or any other real securities (after bearing the proportion of the debts, legacies, and costs, directed to be paid thereout) belonged to the testator's two next of kin in equal moieties. The above decree is stated at length in Seton's Forms of Decrees, 130—132.

(*y*) *Howse* v. *Chapman*, 4 Ves. 542.

make the necessary apportionment for settling the rights of the parties (*z*).

In a recent case (*a*), where a testatrix gave two legacies to charitable institutions, and the residue of her estate which consisted partly of mortgages, for other charitable purposes; it was ordered, that such two legacies should be paid out of

(*z*) *Crosbie* v. *Mayor of Liverpool*, 1 Russ. & M. 761. It appeared by the Master's report, that the testator's personal estate amounted to 1386*l.* 0*s.* 5*d.*, of which 928*l.* 16*s.* 2*d.* consisted of money due on mortgage and the produce of leaseholds; and the debts, legacies, and funeral expenses amounted to 872*l.* 7*s.* 6*d.* The decree on further directions was as follows:—That it be referred to the Master to ascertain how much of the sum of 1386*l.* 0*s.* 5*d.*, certified by the Master to be the amount of the testator's personal estate, come to the hands of the plaintiff, his executor, has arisen from leaseholds and money due on mortgages; and to ascertain how much has arisen from other particulars; and it is ordered that the Master do apportion the debts, legacies, funeral and testamentary expenses of the said testator, between so much of the personal estate as he shall find to have arisen from leaseholds and the money due on mortgages, and so much thereof as he shall find to have arisen from other particulars, according to their respective values; and it is ordered that he do tax as between solicitor and client the costs of these suits of all parties, and apportion the same between the produce of the real estate of the said testator, such part of the personal estate as he shall find to have arisen from leaseholds and money due on mortgage, and so much thereof as he shall find to have arisen from other particulars, in like manner as hereinbefore directed, as to the debts and legacies, funeral and testamentary expenses; and it is ordered that such costs, when so taxed and apportioned, be paid by the plaintiff out of the said several estates, according to such apportionment; and this court doth declare that the residue, if any, of the personal estate which has not arisen from leaseholds or money on mortgage, will be applicable to the purposes of the charity, and the residue of such personal estate as the Master shall find to have arisen from leaseholds and money on mortgage, will belong to the defendant as the only next of kin of the testator, and the residue of the produce of the real estate will belong to the defendant in the supplementary suit, as the personal representative of the heir-at-law of the testator. Reg. Lib. (A.) 1820, fol. 1362, 1 Russ. & M. 761, 763, n. See *Paice* v. *Archbishop of Canterbury*, 14 Ves. 364; 1 Russ. & M. 759, n.; *Curtis* v. *Hutton*, 14 Ves. 537.

(*a*) *West* v. *Shuttleworth*, Reg. lib. (B), 1834, fol. 575—577.

the pure personal estate, and the personal estate connected with realty *pro ratâ;* and it was declared, that so much of the two charitable legacies as should be proportioned to the amount and value of so much of the personal estate as consisted of mortgages, leaseholds and other interests in, or charges or incumbrances affecting real estate, were void by statute 9 George II. c. 36; and that so much of the said charitable legacies as should be proportioned to the amount and value of the other part of the testatrix's personal estate, were good; and it was referred to the Master to ascertain the amount of the residue, and to distinguish such part thereof as had arisen from interests affecting real estates, from such parts as consisted of pure personal estate.

It being lawful for a testator to give legacies out of his pure personal estate, or the residue of such estate, to charitable uses; it is proper, where the personal property is composed of any interests affecting land, for a testator to direct, "that the legacies for charitable purposes shall be paid exclusively out of such part of his personal estate as he can by law charge with the payment thereof;" by which means many difficulties, with respect to the apportionment of the mixed personal fund, may be avoided (*b*).

By the civil law a legacy to pious or charitable uses, had a preference; but by our law, in case of a deficiency of assets, legacies to charities must abate in proportion with other legacies (*c*).

A testator, by will, directed his leaseholds, (which were held for lives,) and personal estate to be sold, and the produce to be applied in payment of his debts and the legacies

(*b*) See *Dixon* v. *Dawson*, 2 Sim. & Stu. 327; *ante*, p. 229, n.

(*c*) *Tate* v. *Austin*, 1 P. Wms. 264; *Masters* v. *Masters*, *Id.* 421; *Attorney General* v. *Hudson*, *Id.* 674. It was held, that there should be no abatement in respect of 3*l.* given to the poor of three parishes, because they were considered as part of, and as *doles* at, the funeral. *Attorney General* v. *Robins*, 2 P. Wms. 23. See *Bishop of Peterborough* v. *Mortlock*, 1 Br. C. C. 566; *Fielding* v. *Bound*, 1 Vern. 230; Duke, 185, 186 (191).

given by his will, and to be given by any codicil; and by his codicil he gave to the executors of his will 2000*l.* "out of his personal estate," upon trusts for public charities. On a question whether there should not be an abatement from that sum, which had in part been paid out of a mixed fund, to the extent of the leasehold for lives: Sir *John Leach*, M. R., held, as a distinction was made between the leasehold estate and the personal estate; and the testator in the codicil, spoke of the personal estate, that the charitable legacies were not charged on the leaseholds, but wholly payable out of the personal estate (*d*).

The general rule is, that interest on legacies given to charities, will be payable at the rate of 4*l. per cent.* from the end of one year after the death of the testator (*e*).

Where the trustee of a charity estate had paid the balances of the rents received by him, into a mercantile house, where it was used in carrying on trade, in which he was a partner, he was charged with interest at 5 *per cent.* upon his balances, but the court refused to direct annual rests, as there was no express direction for accumulation, nor fraud in the trustee's accounts (*f*).

(*d*) *Wilson* v. *Thomas*, Rolls Court, 30 July, 1833, Law Journ. vol. iii. N. S. 144.

(*e*) *Attorney General* v. *Hayes*, 1 Atk. 356, n. by Sand.; *Attorney General* v. *Munby*, 1 Mer. 346.

(*f*) *Attorney General* v. *Solly*, 2 Sim. 518. See *Raphael* v. *Boehm*, 11 Ves. 92; *Stacpoole* v. *Stacpoole*, 4 Dow, 209.

SECTION VIII.

Of exemptions from the statute 9 *Geo. II. c.* 36.

1. *Annuities*, p. 241.
2. *Exceptions in favour of English Universities and Colleges*, p. 244.
3. *Queen Anne's Bounty*, p. 255.
4. *Hospitals*, p. 255.
5. *Devises by Freemen, according to the custom of London*, p. 257.
6. *Gifts of real and personal estate in Scotland*, p. 257.
7. ——————————— *in Ireland*, p. 262.
8. ——————————— *in the West Indies*, p. 263.

THE consideration of some of the exemptions from the statute 9 Geo. II. c. 36, has been anticipated in a former part of this work, in cases where the power given to invest money destined for charitable purposes is merely discretionary and not imperative (*a*), and where the money is not to be laid out in acquiring fresh land for charitable purposes, but in the improvement of real estates already devoted to those uses (*b*). It is also sufficiently apparent, from preceding parts of this work, that the stat. 9 Geo. II. c. 36, does not restrain bequests to charitable uses of such personal estate as does not arise from any interests affecting real estates (*c*). A bequest of stock in the public funds to charities is valid (*d*).

A bequest out of real estate to erect a monument in a church to the testator's memory, is not within that act, such an object not being a charitable use, but an expenditure by the party on himself for the gratification of his own vanity (*e*).

(*a*) *Ante*, pp. 182—188.
(*b*) *Ante*, pp. 188—192.
(*c*) *Ante*, pp. 117—121.
(*d*) *Piesckel* v. *Paris*, 2 Sim. & Stu. 384.
(*e*) *Mellick* v. *President and Guar-*

Fixtures which a testator has a right to remove from a leasehold house being mere personal chattels, may pass under a bequest of the residue of personal property for charitable purposes (*f*).

By 42nd Geo. III. c. 116, s. 50, any person or persons, by will or otherwise, or any bodies politic or corporate, or companies, may give any sum or sums of money for the purpose of applying the same in the redemption of the land tax charged on any manors, messuages, lands, tenements, or hereditaments settled to any charitable uses; which sum or sums may and shall be so applied accordingly, any statute of mortmain or other statute or law to the contrary notwithstanding.

It appears by the statute 43 Geo. III. c. 108, already mentioned (*g*), that any person may by will, executed three months before his death, give five acres of land, or personal property to the amount of 500*l.* for the building or repair of any church or parsonage house.

By 5 Geo. IV. c. 39, s. 3, the trustees of the *British Museum* are enabled to take by devise, for the benefit of that institution, lands or money charged thereon (*h*). Before that act, a gift of the produce of real estate for the benefit of that institution, was held void (*i*).

1. *Annuities.*] An annuity neither charged on land nor to be paid out of nor secured by any charge or interest in land, may be given to charitable uses (*j*). It appears by a case already stated (*k*), that a direction to executors to settle an annuity for a charitable purpose generally, and not requiring the fund to be laid out in land, is valid.

Where a testator directed, that as his debts should come

diens of the Asylum, Jac. R. 180; *ante*, pp. 87, 88.

(*f*) *Johnston* v. *Swann*, 3 Madd. 467.

(*g*) *Ante*, p. 53.

(*h*) *Ante*, p. 57.

(*i*) *The Trustees of the British Museum* v. *White*, 2 Sim. & Stu. 594; *S. C.* 3 Moore & P. 689.

(*j*) *Waite* v. *Webb*, 6 Madd. 71. See *ante*, p. 9.

(*k*) *Sorresby* v. *Hollins*, 9 Mod. by Leach, 221; *ante*, pp. 183, 184.

in and his effects be disposed of, his executors should purchase certain annuities, one-half to be paid to the elders of a Baptist congregation in trust, for the poor of that congregation, and the other half to the elders of a congregation of Independents, to be distributed amongst the poor in like manner; and the testator, by a codicil, gave another annuity to a person for life, and at her death to go upon the like trusts as the other annuities. The decree directed the Master to set apart a proper fund of the testator's personal estate for securing the payment of the annuities, which were to be applied during the continuance of the lives for which they were given, and after to the charitable uses given by the testator's will (*l*).

Questions have sometimes arisen whether the right granted was an annuity or a rent-charge. Thus, where by an act of Parliament 2nd George I. reciting, that King William and Queen Mary, in consideration of the services of the Duke of *Schomberg*, determined to bestow on him 100,000*l.* out of the Exchequer, to be laid out in lands of inheritance, to be settled as therein mentioned; and that by letters patent they had granted to the Duke of *Schomberg* the yearly sum of 4000*l.* payable quarterly, to him or the heirs male of his body, out of the revenue of the Post-office, being interest for the said sum of 100,000*l.*, until paid. His majesty was empowered to grant to the Duke of *Schomberg*, and the heirs male of his body, with remainder to his right heirs, until the said sum of 100,000*l.* should be paid, an annuity of 4000*l.*, payable out of the revenue of the General Post-office; such grant was accordingly made by letters patent, containing a proviso, that as soon as the 100,000*l.* or any part thereof should be paid off, the whole or a proportional part of the interest should abate.

This annuity having come into the possession of the Earl of *Holderness*, he assigned it by deed to a trustee, and afterwards charged it with the payment of his debts. It was objected by his heir-at-law, that this was real property, and

(*l*) *Attorney General* v. *Graves*, Ambl. 157, note by Blunt.

therefore, that the entail could not be barred by the mere deed of assignment; great reliance was placed upon the fact that 100,000*l.*, its redemption price, was to be laid out in land: but Lord *Thurlow* held it to be the grant of an annuity perpetual in its nature; that it did not savour of lands; but being merely personal, was capable of being conveyed either with or without a fine, and therefore the assignment was effectual (*m*).

The title to the *Caribbee* Islands, in the *West Indies*, having vested in Lord *Kinnoul*, under an original grant to Lord *Carlisle* from James I., it was agreed that this title should be surrendered to the crown in consideration of an annual payment out of the profits arising to the crown in respect of the seignory of the island; accordingly a sum of 1000*l.* a-year was granted to Lord *Kinnoul* and his heirs, out of the duty of 4½ per cent. which is paid to the crown in specie from the produce of the island of *Barbadoes*; and the grant was secured by a collateral charge on the rest of the king's revenue. It was urged, that these duties, being paid in respect of the seignory of the island, constituted a species of realty, and therefore the annuity charged thereon was properly a rent, and to be treated as real property: but Lord *Hardwicke* determined, that it was a mere personal annuity, neither having any relation to lands or tenements, nor partaking of the nature of a rent; and even admitting the duties to be in the nature of a reserved rent on the product of the islands, on which the annuity was charged; still the fund was only a custom or duty on the exports of the island, and not a reservation out of the island, and therefore, that the annuity to Lord *Kinnoul* was a personal inheritance (*n*).

The same property has since been the subject of dispute, in which case it appeared, that by virtue of several assignments and ultimately by an indenture, dated in May, 1773, the annuity of 1000*l.* was granted and assigned to *W. Stafford*, his heirs, executors, administrators and assigns, subject

(*m*) *Earl of Holderness* v. *Lord Carmarthen*, 1 Br. C. C. 377.

(*n*) *Lord Stafford* v. *Buckley*, 2 Ves. sen. 171.

to redemption on payment of 12,381*l.* 14*s.* 10*d.* with interest. *W. Stafford* by his will, dated 22nd October, 1777, gave all his real and personal estate to his wife, who by her will, dated March, 1810, attested by *two* witnesses, after directing her debts to be paid and giving several legacies, bequeathed all the rest of her personal estate to her executors, upon trust, to convert it into money, and to pay certain legacies and annuities, and to appropriate certain sums for the benefit of charities, and to apply all the residue of her personal estate and effects equally between and for the benefit of three charities therein named. The question for the opinion of the court was, whether the legal estate and interest in the annuity passed by the will of *Mrs. Stafford* to the executors named in her will, and the Court of King's Bench certified that it did (*o*).

2. *Exception in favour of English Universities and Colleges.*] In conformity with the laws restraining alienations in mortmain, bodies politic and corporate are generally disabled from taking lands by devise. By the statute 34 & 35 Henry VIII. c. 5, s. 5, a general power is given to all persons having a sole estate, or being tenant in coparcenary, or in common, in fee simple, of disposing of lands by will to any person or persons *except bodies politic or corporate* (*p*). Although corporations were expressly excepted in the above statute, they were not rendered totally incapable of taking the benefit of a devise in their favour, and therefore a direction by a testator to his executors to convey lands by the advise of counsel, to any corporation, spiritual or temporal, may be carried into effect, if a license in mortmain be obtained (*q*). And although a devise to corporations in trust for other persons is void at law, the lands will be

(*o*) *Aubin* v. *Daly*, 4 Barn. & Ald. 59.

(*p*) By the bill for amending the law of wills now in progress through Parliament, it is provided, "that no devise or other disposition by will, to any body politic or corporate shall be valid, unless such body politic or corporate is empowered by any act of Parliament to acquire real estate by devise."

(*q*) *Porter's* case, 1 Rep. 25 a.

charged with the trust, and the heir-at-law of the testator will be decreed to be a trustee for the uses of the will (*r*).

The statutes 1 & 2 Philip and Mary, c. 8, s. 50 (*s*), took off this restraint in favour of spiritual corporations for 20 years; and colleges were so much favoured by the law at that time, that a devise to *Trinity* college, though a lay corporation, was held to be within the protection of that law (*t*). But when the 20 years had expired, spiritual corporations as well as others, were incapable of taking by devise; and from that time to the 43rd Elizabeth, c. 4, corporations could not take by devise at all, (except under a custom of devising in mortmain,) either with license or without it (*u*).

The judges laid hold of the words *limited* and *appointed* in that act, and held, that if there was a gift in fact by a person who had a legal capacity to give in any way, the intention, improperly executed, was a sufficient foundation for supplying any imperfection in the mode of donation, and that the Legislature intended, that if estates were given in fact, defects in form were to be overlooked, and the charity to take place (*v*). This favourable construction took place with respect to gifts to charitable uses made before the statute 43 Elizabeth, c. 4, by making a devise void at law valid in equity.

Lord *Eldon* said, "The whole series of decisions upon the statute 43 Elizabeth, c. 4, proceeded on the principle that where there is an ability in the grantor to grant, and the gift is for charitable purposes, the grant though void at the time when it was made, is, by the effect of that statute, rendered operative. That act operates only where there is a devise for charitable purposes by a party who has ability to devise; a bequest by a person unable to give, must be considered in the same light as a deed executed by an infant" (*w*).

(*r*) *Sonley* v. *Clockmakers' Company*, 1 Br. C. C. 81.

(*s*) *Ante*, p. 42.

(*t*) Dyer, 255 b; 1 Roll. Rep. 166, 418; Hob. 122, 123; 11 Rep. 71.

(*u*) See Wilmot's Notes, 11.

(*v*) 1 Eden, 14; *Rex* v. *Newman*, 1 Lev. 184.

(*w*) *Attorney General* v. *The Skinners' Company*, 2 Russ. 417.

The statute of the 43rd Elizabeth, c. 4, had a retrospective as well as a prospective effect; and therefore a will, containing a disposition to a charity, made antecedent to that statute, although void as a will, was held, by the effect of that act, to be good as an appointment (*y*).

But Lord *Eldon* said, that he could not discover on what principle the decision of the court proceeded, in the case last cited (*z*).

So a devise to charitable uses made before the statute of wills (*a*), was held to come within the relief of the statute of 43 Elizabeth, c. 4 (*b*).

It was decided, that although a devise of lands to a corporation was void, yet where it was for a charitable use it operated as a good appointment under the statute 43 Elizabeth, c. 4 (*c*). Sir *John Leach*, V. C., said, "It is very singular, but certainly true, that a devise to a corporation before the 43rd Elizabeth, c. 4, has been established as a good appointment under that statute; it is a very extraordinary doctrine; the Legislature could not have meant that—it must have meant by the use of the word 'appointment' in that statute, a legal appointment" (*d*). And the same learned judge has since held, that although in 1565, which was before the statute 43 Elizabeth, c. 4, no legal devise could be made to a corporation for a charitable use, yet lands so devised were in equity bound by a trust for the charity, which a court of equity would then execute (*e*).

A devise by a tenant in tenant, who cannot make a disposition of lands by will, was held good in favour of a charity. Where a *tenant in tail* devised freehold and copyhold lands to his wife for life, with remainder to the master and fellows

(*y*) *Smith* v. *Stowel*, 1 Ch. Cas. 195.

(*z*) 2 Russ. 418.

(*a*) 32 Henry VIII. c. 1; 34 & 35 Henry VIII. c. 5.

(*b*) *Collison's* case, Hob. Rep. 136, *S. C.* Moore, 888; *Attorney General* v. *The Skinners' Company*, 2 Russ. 418, 419.

(*c*) *Jesus College* case, Duke, 78 (363).

(*d*) *Attorney General* v. *The Skinners' Company*, 5 Madd. 200.

(*e*) *Attorney General* v. *The Master of Brentwood School*, 1 Mylne & K. 390.

of *St. John's College*, in *Cambridge*, for maintenance of the scholars there, and the testator's heir, having entered upon the wife to avoid the devise, the master and fellows of the college preferred a bill in chancery to preserve their right, and to confirm the devise to them. Lord Keeper *Littleton* held, that although the heir might evict the wife, that the devise to the college was valid by virtue of the statute 43 Elizabeth, c. 4, as there was a gift to a charitable use which should not be avoided for want of circumstance of law to make it good; and that, although the college was incorporated by another name than that mentioned in the devise, it was good by that act; and that if the heir avoided the estate tail against the wife-at-law, yet the remainder to the college should stand good, and be a remainder without a particular estate, which is contrary to the rules of law (*f*); but such defects, in cases of charitable uses, are remedied by the statute 43 Elizabeth, c. 4, by a favourable interpretation for the maintenance of charity, as in other cases upon statutes for piety and charity (*g*).

The statute 43 Elizabeth, c. 4, has been considered in another case, as a partial repeal of the exception in the statute of wills (*h*); and, therefore, that a devise to any of the colleges, in either of the universities, after that act, was good, not merely in equity, as an appointment to charitable uses, but also in law, so as to vest the legal title in them (*i*).

Since the statute 9 Geo. II. c. 36, devises of lands to corporations for charitable purposes are generally void; but that act contains a special exception in favour of the two universities and certain other colleges; for, by the 4th section of that act it is provided, that it should not make void the dispositions of any lands, tenements, or hereditaments, or of any personal estate to be laid out in the purchase of any lands, tenements, or hereditaments, which should be made in

(*f*) An estate in remainder requires a particular preceding estate to support it. See Fearne on Cont. Remrs. 281, 7th ed.; 2 Bl. Comm. 164.

(*g*) *Plate* and *St. John's College*, in *Cambridge*, Duke 77 (379).

(*h*) 32 Henry VIII. c. 1; 34 & 35 Henry VIII. c 5.

(*i*) *Bennet College, Cambridge*, v. *Bishop of London*, 2 Bl. R. 1182.

any other manner or form than by that act was directed, to or in trust for either of the two universities in *England*, or any of the colleges or houses of learning within either of the said universities, or to or in trust for the colleges of *Eton*, *Winchester*, or *Westminster*, or any or either of them, for the better support and maintenance of the scholars only, upon the foundations of the said colleges of *Eton*, *Winchester*, and *Westminster*. The fifth section of the same act provides, that no such college or house of learning, holding benefices equal in number to one moiety of the fellows, or where there are no fellows to one moiety of the students upon the foundation, shall be capable of acquiring more, the benefices annexed to the headships of the colleges not being computed: but by statute 45 Geo. III. c. 101, after reciting that the above restriction had been found by experience to operate to the prejudice of such colleges or houses of learning, by rendering the succession too slow, and that the removal of such restriction would be for the benefit of such colleges and of the universities, and tend to the promotion of learning, and to the providing a better supply of fit and competent parochial ministers, the fifth section of the above act is repealed, so far as regards colleges in the universities.

Before the restriction on the number of livings to be held by colleges was removed by the provision in the last act, it had been decided, in the case of a devise made in 1714 to trustees for the use of University College to buy advowsons, which college had acquired as many advowsons as were allowed by the 5th section 9th Geo. II. c. 36; that the trust should be performed by exchange of advowsons or otherwise *cy pres*, the heir-at-law having been disinherited by a will, which was valid at the time when made (*j*).

A testator devised all his real estate in *Great Britain*, except his house at *Newmarket*, to trustees, to pay annually all the yearly rents of the premises, in equal proportions, to twelve students (four of whom were to be educated in the study of divinity at *Christ's College*, four in physic at *Caius*

(*j*) *Attorney General* v. *Green*, 2 Br. C.C. 492.

College, and four in the study of the common law at *Lincoln's Inn*) provided that, in case the act of mortmain should prevent this disposition, then to the thirteen fellows of *Christ's*, and the fellows of *Gonville* and *Caius*, and the scholars of both the said colleges living at his death, each fellow to have a double proportion to each scholar. He then devised the house at *Newmarket* to the master and fellows of *Christ's*, in trust, that they and their successors should apply the yearly rents for some under-graduate student. It was contended that the devise to the fellows and scholars was void, as made to them in their natural capacity, and that the exception in the statute 9 Geo. II. c. 36, extended only to devises to the general use of the universities and colleges, but not to the particular members of either of them. But Lord *Northington* was of opinion, first, that the devise was for the benefit of the whole body corporate; secondly, had it not been so, he should still have thought that the Legislature intended, by the exception in the statute, to save a devise for the benefit of particular members, as well as of the whole body; and he further added, the Legislature meant to except such devises as were really and *bonâ fide* for the benefit of colleges, not those in which the legal interest only passes to the college in trust for other charitable uses, for then the statutes might be defeated every day; and this devise is for the benefit of the whole society, even of the master himself, who must pass through a fellowship and partake of the testator's bounty, in his progress towards the headship. Besides, any encouragement for youth to enter into a particular college, is a general benefit and profit to the whole society. The Legislature has thrown no restraint on these gifts, when made to the body corporate of either universities, or to colleges, already established there. This devise to the fellows and scholars contains no circumstances that intimate any intent to give them the estate in their personal capacities. It is clearly to them, as members of the body corporate, for a perpetual augmentation of the revenue of themselves and their successors (*k*).

(*k*) *Attorney General* v. *Tancred*, 1 Rep. 90. Eden, 10; S. C. Ambl. 351; 1 Bl.

The decision in the case last cited, that a gift to a college, not beneficially, but in trust for another object, is not within the exception in the fourth section of the statute, has been confirmed by a recent case; where a party assigned by deed which was duly inrolled, mortgages on real estate to the master, fellows, and scholars of *Trinity College, Cambridge*, in trust to receive the interest, and pay the same to the rector for the time being of *Gilling East*, for his own use and benefit, and to receive the principal sums when the same became due and payable; and again to invest the same, or else to suffer the same to remain so invested as aforesaid, "in order that the interest of the same might for ever thereafter be paid to, and received by the rector for the time being of *Gilling East* aforesaid, for his own use and benefit." The gift having failed by the death of the grantor within twelve months, and the testator having by his will given the advowson of the rectory in question to *Trinity College*, for their own benefit, and referred to the above assignment; it was contended, that the deed assigning property in augmentation of the advowson, was in fact a deed for the benefit of the college, and therefore within the exception in the act. But Sir *William Grant*, M. R., held it impossible to connect together the will and the deed, so as to make the one operate upon the other by way of relation. They must be taken as they stood, singly, and the deed being a gift to the college, in trust for another object, was not within the exception in the act, and failed by the grantor's death within twelve months (*l*). We have already seen, that an assignment of a church lease, duly inrolled, executed more than twelve months before the death of the grantor to the master and fellows of *Trinity College*, as trustees for the incumbent of a rectory for the time being, is valid (*m*). And a legacy of 3000*l.* to the master, fellows, and scholars of *Trinity College*, in order that the interest of the same might for ever thereafter be paid to and received by the rector for the time being of a

(*l*) *Attorney General* v. *Munby*, 1 Mer. 327.

(*m*) *S. C.* 1 Mer. 327; *ante*, pp. 128, 129.

living, (the advowson of which the testator devised to the same college) for his own use and benefit, was held valid (*n*).

It seems, that colleges taking real property under a devise, should obtain a license in mortmain to hold the property given to them, if they have before acquired property to the extent of their existing license (*o*). Where a perpetual advowson of a rectory was devised to the master, fellows, and scholars of *Trinity College*, under a restriction that the same should not be held by any college preacher, but that in all cases the fellow presented to it should vacate his fellowship, and take his degree of doctor of divinity the commencement following, or as soon after as might be, no question was raised as to the validity of the devise, (but as the heir was not a party to the suit, no decree was made respecting it,) as it appeared that the college by their charter, and the statutes of their foundation, had a license in mortmain to a certain extent, and had obtained a special license to hold the advowson (*p*).

The opinion of Lord *Northington*, that the exception applied only to Colleges established in the Universities at the time the act passed (*q*), was doubted by Lord *Rosslyn* (*r*).

It was said, that if the master or president of a college, by his will devised any land to his college, and died, that such devise was void; for at the time when the devise should take effect, the college was without a head, and so incapable of taking (*s*).

A devise and bequest to a college, not for academical collegiate purposes, but subject to regulations inconsistent

(*n*) *S. C.* 1 Mer. 327.

(*o*) *Attorney General* v. *Bowyer*, 3 Ves. 727. See *ante*, p. 41.

(*p*) *Attorney General* v. *Munby*, 1 Mer. 327.

It appears, that on the 9th Feb. 1813, an especial license was granted to the master, fellows, and scholars of *Trinity College, Cambridge*, and their successors, to take and hold in mortmain certain lands, &c., conveyed to them by John Pigot, clerk, the above mentioned testator, and the perpetual advowson of *Gilling East* in the county of York, devised to them by his will.

(*q*) 1 Eden, 16.

(*r*) See *Attorney General* v. *Bowyer*, 3 Ves. 728.

(*s*) *The President of Corpus Christi College* Case, 4 Leon. 223. *S. C.* Dalison, 31; *ante*, p. 28.

with the constitution of the college, are void. Thus where a testator by his will devised the remainder of his real and personal estate to University College, Oxford, and by a codicil, directed that the college should never sell, change, or otherwise alienate the donation of the manor of Denton, or any part of the lands and tenements thereto belonging, from the purposes intended, which were, that if there should be a senior fellow of the college who must be a divine, of the age of forty, in all respects of good repute, he should be the possessor of all his estate and furniture of the testator's house at *Denton*, to keep it in repair, not to fell timber without consent of the college; to live in his house hospitably, and sometimes give entertainment to the poor, to distribute cordials and drugs to them when needful; to give to them some books and pamphlets of good morals and piety, and to give an annual entertainment to the fellows; and if he proved dissolute, then the election to be void, and another proceeded to.

Lord *Hardwicke*, in intimating an opinion that the trust could not be supported as a charitable use (*t*), said, "it was necessary to know the effect of the devise itself, how far the testator's direction for fixing a senior fellow and providing for him in that manner, was inconsistent with the constitution of the college, as to residence, &c., for if so, it was contrary to the intent of the trust, which was, that he should be a continuing fellow of the college, not barely when he was elected. Then a point will arise if this is not a good charitable use within the statute 43 Eliz. c. 4; it will stand as a devise to the college generally; it will be to a body capable of taking, which will depend on the power they have to take in mortmain; and it is necessary to be inquired into, how far they can do so, that the whole may be before the court, when the trust comes to be determined. The Master therefore must inquire into that, and whether the regulations are inconsistent with the college statutes; and reserve the consideration of the validity and operation of the trust, till after the

(*t*) See *ante*, pp. 86, 87.

report." Lord *Northington* afterwards declared, that "the regulations indorsed on the codicil, were inconsistent with the constitution of the college, and consequently, that the trust whereupon the testator's real estate, and the surplus of his personal estate were devised and given to the college, being void, the devise of the real estate was a resulting trust for the testator's heir-at-law; and that, for the same reasons, the bequest of the surplus of the personal estate to the executors, was also void, so far as it related to any interest or benefit, thereby given to the colleges in succession (*u*).

Where a devise of lands is in general terms to such charitable uses as a third person shall appoint, it has been contended, that an appointment by the donee in favour of any of the charities, excepted out of the act, namely, the colleges of the two English Universities, and the three public schools, would be good. Thus where an estate was given to a party in fee, and the testatrix added that her wish and desire was, that the devisee should convey it to some charitable uses, leaving the choice entirely in his discretion, and concluded by stating her intent, that he should enjoy the estate for his own benefit during his life (*v*), the devisee having died without making any appointment, the point did not arise, but it was argued, that inasmuch as some charitable uses are excepted out of the statute, the court ought to presume, that the charitable uses contemplated by the testatrix, were those to which the devise might legally be applied. In answer to which, it was said by *Bayley*, J., "This is a general devise, and not in favour of any of the excepted charities. And another answer to that argument is, that although the devisee might perhaps have executed a conveyance to some of the charitable uses, within the proviso of the statute, and might have so disappointed the heir-at-law, still, that as he

(*u*) *Attorney General* v. *Whorwood*, 1 Ves. sen. 534, Reg. lib. 1755, A. fol. 607—609, Belt's Suppl. 252. See 7 Ves. 496, 1 Sch. & Lef. 437. Lord *Eldon* said, 10 Ves. 538, that the result of this case was, the *substratum* of the charity failed, and all those partial dispositions that would have been good charity, if not connected with that, failed with it.

(*v*) *Ante*, p. 143.

has not done so, the heir-at-law is not excluded (*w*)." And *Holroyd*, J., said, "the will does not give power to the devisee, to determine whether the estate shall be limited to a charitable use or not, but it is imperative upon him to give it to some charitable use; and a devise to any such use is void by the statute. If it was intended to confine the objects to the exception in the act, the will should have confined it to the excepted charities (*x*)."

After a clear gift to a college of three presentations to a living, their interest cannot be extended by doubtful words. Thus, where a will dated in 1704, contained the following words: I do direct and appoint, that the vicarage of *Twyford* and *Ouselsbury* parishes, when become vacant, shall from time to time, by the persons then entitled as to the presentation, be tendered to *Emanuel College, Cambridge*, so as an election be made of a person resident at the same time in the said college. By a codicil, the testator devised as follows: "I do devise to the master and fellows of *Emanuel College*, the successive presentation *for three turns*, or alterations from the present incumbent, to the church of *Henstead* in *Suffolk*; so as the said election be made to such person as at the same time, and before is and was resident in the said college; *and as* the parties then concerned can agree, the said college to proceed in the future elections." The college having presented for three successive turns, the heir-at-law of the testator contended, that all interest of the college to present to *Henstead*, had then ceased, and the college insisted that the heir was bound to present their nominee. The Lord Chancellor said, the testator has given the three turns expressly to the college, and his lordship did not consider himself bound to discover what his further intention was, or whether he had any intention. The testator meant the presentation to remain in his family, but that they should consent according to the nomination of the college, and that the person to be presented, should at the time be

(*w*) *Doe* d. *Burdett* v. *Wright*, 2 Barn. & Ald. 722.

(*x*) *S. C.* Ibid, 723, 724.

resident in the college, which would be good, though he became resident after the vacancy. If the college had exhausted their members, the family might have presented other persons. This is something like his meaning, it is clear there is no equitable gift of the future nomination (*y*).

3. *Queen Anne's Bounty.*] It has been already shown (*z*) that by statute 2 and 3 Anne, c. 11, s. 4, the governors of Queen Anne's Bounty are enabled to take lands or personal estate by deed or will; and that by the statute 43 Geo. III. c. 107, s. 1, the above provision is to remain in force, notwithstanding the 9th Geo. II. s. 36, which last act had previously been held to render void a gift of money to such governors (*a*).

By 45 Geo. III. c. 84, s. 3, in order to facilitate the intentions of all such persons as may be disposed to contribute to the augmentation of such livings and curacies as are within the laws in force respecting Queen Anne's Bounty, it is enacted that it shall be lawful for any person or persons having in his, her, or their own right any money, goods, chattels, or other personal effects at his, her, or their will and pleasure, to give or grant to or vest in the governors of Queen Anne's Bounty and their successors, to be by them disposed of according to law, all or any part of such money, goods, chattels, or other personal effects, without any deed or deeds, either inrolled or not inrolled in like manner as he, she, or they could or might have done, either by deed inrolled or not inrolled, or otherwise, before the passing of that act.

The third section provides that nothing therein contained shall, in any manner, alter or affect the law then in force respecting the gift or conveyance of any lands, tenements, or hereditaments, by any deed or deeds, or the disposition thereof, or of any goods, chattels, or other personal estate, by will or testament.

4. *Hospitals.*] It appears, in a preceding part of this work,

(*y*) *Emanuel College, Cambridge v. Bishop of Norwich*, 4 Br. C. C. 481

(*z*) *Ante*, pp. 51, 52.

(*a*) *Ante*, p. 171.

that the Commissioners of *Greenwich Hospital* and of the *Royal Naval Asylum*, and the members of the *Seaman's Hospital Society* (*b*) are enabled, by several acts of Parliament, to take lands by devise. The governors of *St. George's Hospital* may take by will any money charged on real estates (*c*).

The members of the *Magdalen Hospital* are incorporated by 9 Geo. III. c. 31, by the name of the "President, Vice President, Treasurer, and Governors of the *Magdalen Hospital*, for the reception of penitent prostitutes," with capacity in law to hold and enjoy, in trust, and for the benefit of the said hospital, all such sum and sums of money as have been paid, or should thereafter be paid, given, devised, or bequeathed, by any charitable or well disposed persons, for the charitable purposes mentioned in that act; and without license in mortmain, to purchase, take, and receive any lands or hereditaments, or any estate or interest arising or derived out of any lands or hereditaments for the purposes aforesaid.

The *Bath Hospital* having been incorporated by an act of Parliament (*d*), and enabled to take "*all monies whatsoever*," it was held to apply to such only as were given according to the general rules of law; and that a clause enabling the hospital to take lands without license in mortmain, was applicable only to devises according to law; and therefore the devise of the residue of "personal estate, arising by sale of *real* estate, for the benefit of such hospital," was held void (*e*); for the charter of incorporation having been granted by Parliament to save expense to the promoters of the charity, and to confer powers which the king could not grant, was to be construed in the same way as any other charter granted by the crown only.

But a legacy to the *Bath Infirmary*, given out of the produce of real estates, has been since held to be valid, because the statute 19 George III. c. 23, enables the governors of that institution to acquire lands or any interest in them, and

(*b*) *Ante*, pp. 46, 47.
(*c*) *Ante*, p. 48.
(*d*) 12 Geo. II. c. 31.
(*e*) *Mogg* v. *Hodges*, 1 Cox, 9; *S. C.* 2 Ves. sen. 52.

any money or personal property to be laid out in lands pursuant to any will or otherwise, not exceeding 1000*l. per annum* (*a*).

5. *Devises by freemen, according to the custom of London.*] It has been already stated (*b*), that notwithstanding the statute 7 Edward I. st. 2, a citizen and freeman of London may by custom devise lands in mortmain; and it seems to be considered (*c*), that such custom is not affected by the statute 9 George II. c. 36; but as there is in that act no reservation of the custom, which is contained in 23 Henry VIII. c. 10, it is at least doubtful, whether it is not superseded so far as relates to devises to *charitable uses*. In *Middleton* v. *Cater* (*d*), it was contended, that a devise by will, dated in the year 1777, by a freeman of *London*, to charitable uses, was valid, notwithstanding the statute 9 George II. c. 36; but it appears only to have been decided in that case, that the custom is confined to lands in *London*; for the testator in that case not having devised any lands there, it was unnecessary to decide how far the custom was affected by that statute.

6. *Gifts of real and personal estate in Scotland.*] The sixth section of the 9th George II. c. 36, provides, that nothing contained in that act shall extend to the disposition, grant or settlement of any estate real or personal, lying or being within that part of *Great Britain* called *Scotland* (*e*).

(*a*) *Malcham* v. *Hooper*, 4 Br. C. C. 153.

(*b*) *Ante*, p. 9.

(*c*) See 2 Rop. on Legacies, 144, 3rd ed.; Bac. Abr. Charitable Uses (B), Customs of London (A).

(*d*) 4 Br. C. C. 409.

(*e*) The purposes for which lands had been given to the church in the times of popery, were, after the Reformation, accounted superstitious; and therefore those lands were declared to belong to the crown by the act of annexation, 1587, c. 29; so that now the only lands which continue mortified to the church in Scotland, are the manors and glebes of parochial ministers, which by that statute are appropriated to the use of the reformed clergy. But mortifications may still be granted in favour of hospitals, either for the subsistence of the aged and infirm, or for the maintenance and education of

We have already seen that the produce of *real* estate in *England* cannot be given for the benefit of a charity in *Scotland* (*f*), and that a bequest of money to be laid out in land either in *England* or *Scotland*, for the benefit of a charity in the latter country, is void (*g*).

But a bequest of money to a religious society in *Scotland*, to be laid out in the purchase of heritable securities there, the interest to be applied towards the education of poor children, is valid; although it was contended, that the bond

indigent children, or in favour of universities, or other public lawful societies, to be holden either in blanch or in feu-farm (names of tenures in *Scotland*); and whatever the society be to whom the donation is made, the superior must lose all the casualties of superiority, for the reason before assigned, *ante*, p. 3. As a consequence of this, lands cannot be mortified without the superior's consent.—Craig. lib. 1, Dieg. 11, s. 21. Upon that ground, and to prevent the crown revenue from being impaired by the loss of its casualties, signatures of lands in favour of corporations will not be allowed to pass.—Ersk. Inst. book ii. tit. 4, ss. 10, 11.

The law of *Scotland* makes no distinction as to the solemnities or formalities, requisite to the validity of deeds, between those which concern charitable uses and other deeds; and therefore, the Court of Session will not aid a defective deed, because the subject is to be applied to a pious use. It was observed many years since, that mortifications to hospitals were growing exorbitant in *Scotland*, and that it were to be wished that the statute 9 George II. c. 36, had been extended there, to restrain them.—1 M'Douall's Inst. 612, 613.

It was decided, that a piece of ground granted in fee for building a church, with a provision in the charter, that it should revert to the superior if at any time it were applied to secular purposes, might be sold when it became necessary to have a larger church than could be built on the area, provided the price were applied to that purpose, on the ground, that such a plan was not adverse to the intention of the original grant.—*Johnston* v. *The Magistrates of Canongate*, May 30, 1804; Dict. Dec. 15112. So where lands held of the crown, which afforded a freehold qualification, were vested in trustees for charitable purposes, it was decided, that they might dispose of the superiority in order to increase the trust fund.—*Trustees of Mrs. Moore's Mortification* v. *Wilson*, June 25, 1814; Fac. Col. 663.

(*f*) *Curtis* v. *Hutton*, 14 Ves. 537; *ante*, pp. 166—168.

(*g*) *Attorney General* v. *Mill*, 3 Russ. 328; *S. C.* 5 Bligh, N. S. 593; 2 Dow & Clark, 393; *ante*, pp. 172, 173.

which would descend to the heir of the obligee was analogous to land (*h*).

A testator, the captain of an *India* ship, when at sea by his will directed the interest of 5000*l.* to be invested in trust, with the magistrates of *Inverness* for the time being, the interest of such sum to be appropriated for the education of five boys in succession, to be selected from the descendants of different families named; the said sum of 5000*l.* as soon as might be expedient, to be invested in lands in the country. By a codicil dated in *London*, the testator gave 5000*l.* "in trust, with the magistrates of *Inverness*, added to the 5000*l.* in the first part of this will, intended there for the education of certain boys, the interest of the two sums, making in all 10,000*l.*," was directed to be paid to a person for life, "and after her decease, that sum to be vested in lands for the education of boys, as above." By two other codicils, made at sea, the testator revoked the life interest, and directed the 10,000*l.*, immediately upon his own death, to be appropriated for the education of boys as above described. A question was raised, on an appeal to Lord *Eldon*, whether the legacy of 10,000*l.* was not void under the 9th George II. c. 36, or whether it was within the sixth section of that act (*i*). It was contended, that the exception in the act was very peculiar, not being general as to the whole operation of the act, but stating particularly in what respect the act should not have operation in *Scotland*; and that the special terms of the clause, which was confined to estates locally situated in that country, furnished decisive evidence that a general exception was not intended, and that the disposition in question, was not of real or personal estate in *Scotland*, but of personal estate in *England*, which in contemplation of law, has locality (*j*).

Lord *Eldon* decided that the bequest was good, observing that, "upon examining the case of *Oliphant* v. *Hendrie*, in the register's book, there appears to be nothing special in it.

(*h*) *Oliphant* v. *Hendrie*, 1 Br. C. C. 571.

(*i*) *Ante*, p. 257.

(*j*) See 1 Br. C. C. 127; 4 Ves. 161.

The testator gave a sum of money to be laid out in heritable securities in *Scotland*, for charitable purposes; and Lord *Thurlow's* decree was that the legacy was good. This is a direct decision upon the point, and if I had more doubt upon it, that authority binds me to determine that this bequest is good" (*k*).

The Court of Chancery never gives directions for establishing a charity in *Scotland*, but directs the money to be paid to the trustees, who must administer it according to the law of *Scotland*, and under the directions of the Court of Session, in case it becomes necessary to resort to any court for direction.

Therefore, where 3500*l.* South Sea Annuities were given to the plaintiffs to be applied to the maintenance of poor labourers residing in *Edinburgh* and towns adjacent, with power for the Lord Provost, &c. to sell the stock and invest it in the purchase of other stock, or in the purchase of lands, the income to be applied in the same way as directed as to the annuities (*l*), Lord *Hardwicke*, being of opinion that he could not give any directions as to the distribution of the money, some of the courts in *Scotland* having jurisdiction on the subject, ordered the annuities to be transferred to such persons as the plaintiffs should appoint, to be applied to the trusts in the will. The decree declared that the trust ought to be carried into execution, except as to any power thereby given to invest in the purchase of lands in *England*.

So where a testator, living in *England*, by his will bequeathed a moiety of his residuary estate "to be laid out in the public funds, or some such security, on purpose to bring one annuity, income or interest, for the benefit of a charity or school, for the poor of the parish of *Dollar* and shire of *Clackmannan*, where he was born, in *North Britain* or in *Scotland*; that he gave and bequeathed to the minister and church of the said parish for ever, say to the minister and church officers for the time being, and no

(*k*) *Mackintosh* v. *Townsend*, 16 Ves. 330.

(*l*) *Provost, Bailiffs, &c. of Edinburgh* v. *Aubery*, Ambl. 236, and note, by Blunt.

other person should have power to receive the annuity but the aforesaid officers for the time being, or their agent appointed for the time by them." On an information and bill filed by the ministers and elders of the parish of *Dollar* against the testator's executors, a decree was made, (reversing the former orders, so far as they confirmed the Master's report, and directed an execution of the scheme approved by him) ordering various sums of stock, constituting a moiety of the testator's estate, to be sold, and the money arising from the sale to be laid out in the purchase of 3 *per cent.* consols in the name of the Accountant General, in trust in the cause, the dividends to be paid to certain persons therein named, or to such other person or persons who, for the time being, should be the minister and church officers of the said parish of *Dollar*, to be by them applied for the benefit of a charity or school for the poor of the said parish, pursuant to the will of the said testator (*m*).

A society in *Scotland* for propagating Christian knowledge, having been incorporated under that name by letters patent, first of Queen *Anne*, and afterwards of *George* II., a testator by his will, dated 16th of September, 1789, made the following bequest:—"I give and bequeath to my executors, in *England*, 20,000*l.* sterling, in trust, to invest the same in the capital stock of 3 *per cent.* reduced annuities, at the Bank of *England*, which said stock I do hereby give and bequeath to the treasurer for the time being of a society in *Scotland* for propagating Christian knowledge, to apply the interest or dividends thereof, from time to time, in equal portions, to and for the uses and purposes of the first and second patent; and I will and order that no part of the said legacy be at any time laid out or employed for the purpose of building, or in repairs or ornaments, but that the same be wholly and solely applied for the charitable and pious uses and purposes of the said society."

In a suit for the administration of the testator's assets, the

(*m*) *Attorney General* v. *Lepine*, 465; 19 Ves. 309. 2 Swanst. 181; *S. C.* 1 Wils. C. C.

court ordered the legacy to be paid and transferred by the executors for the use of the charity, and the treasurer of the charity was to declare the trusts thereof accordingly. The Accountant General certified that he had laid out the legacy in the purchase of Bank 3 *per cent.* Annuities, which had been transferred to his account and accepted by him, in trust, in the cause, to the account of the treasurer of the society in *Scotland* for propagating Christian knowledge. The dividends of the stock had been paid to the treasurer for the time being of the society.

On a petition, which had not been served on the Attorney General or any other party in the cause, presented by the society and their treasurer, an order was made for the transfer of the stock to the society, the petitioners being the persons entitled to the possession of it, and for the payment of the dividends, if there were any then in court, to the treasurer (*n*).

7. *Gifts of real and personal estate in Ireland.*] The statute 9 Geo. II. c. 36, does not extend to *Ireland*, where there is no similar restraint on devises to charitable uses (*o*).

A testator having a considerable estate in land, and also a large personal estate upon mortgage of lands in *Norfolk*, by his will, in 1740, gave to trustees a sum of 7000*l.* to be laid out, after the death of his wife, in the purchase of lands in *Ireland*, the rents to be distributed among poor persons in *Ireland* who should appear to be related to him, or, in default of poor relations, to poor persons in the county of *Antrim*, in *Ireland*.

The executrix, who proved the will by her own will, after reciting the will of the above testator, and that his personal estate was out upon mortgage in *Norfolk*, ordered her real estate to be sold, and 7000*l.* to be paid to the uses declared by the will of the first testator. It was contended that, as the whole personal estate was upon mortgage, in *Norfolk*, it

(*n*) *Emery* v. *Hill*, 1 Russ. 112. Ball & B. 154; *ante*, pp. 110, 111, 112.

(*o*) *Attorney General* v. *Power*, 1

could not be applied to charitable uses in *Ireland;* and that the will of the executrix, confirming it and ordering her real estate to be sold to pay the 7000*l.* was certainly void.

Lord *Loughborough* held the bequest to a charity in *Ireland* good, if it was not made otherwise by the circumstance of the money being upon mortgage of an estate in *England*, which could not be liable to the devise to a charity, but that it was too late to take that objection on the will of the executrix, she having admitted, by the devise to the same uses, that she had personal estate of the original testator; she was therefore paying a debt, not giving money that was upon mortgage, but only admitting that she had 7000*l.* personal estate from him, which, as she was executrix and residuary legatee, was admitting a debt to his estate. Although the court would not marshal assets for a charity, yet it will make the legatees go upon the mortgage, and afterwards the plaintiffs submitting, the charitable legacies were directed to be paid (*p*).

The case last cited was decided on peculiar circumstances, and it is clear that any interest in land in *England* cannot be given for charitable purposes in *Ireland;* but there is no objection to a bequest of pure personal estate in *England*, to be invested in lands in *Ireland*, for charitable purposes (*q*).

Where a testator gave 9000*l.* stock and a sum of long annuities to his children, and in an event which happened, to the rector and parishioners of the parish of *Lesbourne*, in *Ireland*. The Master having stated in his report that, by an act of the Irish Parliament, 40 Geo. III. c. 75, certain commissioners were appointed for the administration of charitable funds in *Ireland*, and that the bequest came within their jurisdiction; the court ordered the stock and annuities to be sold, and the produce to be paid to the commissioners (*r*).

8. *Real estates in the West Indies.*] The statute 9 George

(*p*) *Campbell* v. *Earl Radnor*, 1 Br. C. C. 271.

(*q*) *Curtis* v. *Hutton*, 14 Ves. 540; *ante*, pp. 166—168.

(*r*) *Collyer* v. *Burnett*, 1 Taml. 79.

II. c. 36, does not extend to the island of *Grenada*, in the *West Indies*. A testator by his will, dated in 1799, directed his executors to dispose of all his property (consisting of real and personal property) at *Grenada*, the produce to be remitted to the magistrates of *Banff*, in *North Britain*, to be laid out by them as a charitable fund, in the best manner possible, and to remain under the directions of the acting magistrates from year to year.

By an order made on the hearing of the cause, it was referred to the Master to inquire, and state whether, according to the laws of *Grenada* in force at the time of the testator's death, real estates, situate in that island, might be devised to charitable uses; the Master certified in the negative, and the relators took an exception to that report. Sir *William Grant*, M. R., said, the question in this case is, whether a real estate, or the money to be produced by the sale of a real estate, situated in the island of *Grenada*, can be legally devised to a charitable use; that is a question with respect to which, no court in this country has any direct original jurisdiction. All titles to land are regularly decided upon, in the first instance, by the court of local jurisdiction from whose decision an appeal lies to his majesty in council. In the present case, however, it becomes incidentally necessary to decide the question here; there being a fund in court which is the produce of real estates in *Grenada*, and which must be differently disposed of, according as the devise shall or shall not be held to be valid. It is admitted, that there is no particular act of the insular legislature restraining devises to charitable uses. The assumed ground of the invalidity of such a devise is, that the laws of *England* are in force in the island of *Grenada*, and that the statute 9 George II. c. 36, is, as part of the law of *England*, also a part of the law of *Grenada*. His Honour, after alluding to the manner in which the *English* law was introduced into that island, admitted that it was acknowledged there; but held, that the act in question was a law of local policy, adapted solely to the country where it was made; that it was wholly political, and meant to have merely a local operation, the object of it

being to impede the progress of what was considered a public mischief in *England*, and that the act was throughout inapplicable to the island of *Grenada*, or to any other colony, and the exception to the Master's report was consequently allowed (*s*).

It has been made a question in a recent case, whether a bequest of East India Stock for charitable uses be within the statute 9 Geo. II. c. 36. Thus where a testator, being possessed of 3000*l.* East India Stock, by his will, dated in September, 1830, gave to his executors all his East India Stock, stated to be of the above amount, upon trust, to pay the interest and dividends to E. G. for life, and after her decease to stand possessed of the said stock in trust for *Christ's Hospital*, to be applied to the purposes of the said hospital.

On an information, filed after the death of E. G. at the relation of the governors of *Christ's Hospital*, against the executors and next of kin of the testator, praying that it might be declared that the bequest was valid, and for a transfer of that sum, and for payment of all interest and dividends which had accrued since the death of E. G.; the next of kin of the testator claimed the legacy as void, by the statute 9 Geo. II. c. 36, on the ground that part of the estates and possessions of the East India Company consist of freehold and leasehold estates, and that the dividends payable on East India Stock arise from a mixed fund, composed of rents, gains, and profits arising from such freehold and leasehold estates and properties abroad, and personal estate and effects. It was argued that the statute extended to every species of interest in land, and that as the rent of the warehouses alone belonging to the East India Company amounted to 10,000*l.*

(*s*) *Attorney General* v. *Stewart*, 2 Mer. 143. See *ante*, p. 122, & n. (*y*). On the application of the laws of mortmain and charitable uses to *America*, see 2 Kent's Comm. on American Law, 223, 229—232; 2 Fonbl. Eq. by Laussat, 490—502, American Edition; 4 Wheaton's Rep. It is said, that a devise of lands or of a rent-charge on lands, in the *West Indies*, to a charity in *England*, is good. Instances of the latter have occurred, and the executors or heirs-at-law, never thought of contesting the devise against the charity.—Highmore on Mortmain, 394, 2nd ed.

a-year, it was impossible to deny that the holders of East India Stock had an interest in land. That canal shares, though declared to be personal estate by most of the acts incorporating navigation companies, had been held to give such an interest in land as to render a bequest of them void within the act (*t*). That the company, apart from its power of holding by charter territorial possessions in India, (which was subject to be continued or not by the legislature,) was a trading company—a mercantile partnership upon an extended scale; and, in the event of a dissolution of that partnership, the shareholders would be entitled to share the produce of the warehouses and other real and leasehold estates, of which the property of the company in part consisted. There was a manifest difference between the stock of such a company and stock in the public funds (*u*)—the shareholders of the company having a direct interest in the real and leasehold property possessed by the company, whereas the fundholder had no direct interest in the produce of the land tax; and it was a matter of indifference to him, in his character of holder of public stock, out of what taxes and by what means the government provided for the payment of dividends (*v*). Judgment has not yet been given in this case.

(*t*) *Ante*, p. 160.

(*u*) There does not appear to be much force in this argument, inasmuch as the statute 9 Geo. II. c. 36, does not restrain, but impliedly authorises the gift of stock to charities, *ante*, pp. 119, 240.

(*v*) *Attorney General* v. *Giles*, Rolls Court, 16th July, 1835. The charter of the *East India Company* is dated 5th September, 1698, granted in pursuance of the statute 9 & 10 Will. III. c. 44. The 71st section of that act provides that the estates, interests, and stocks of money of the several corporations, to be established in pursuance of that act, and of each and every particular member thereof, shall be adjudged, taken, and accepted in construction of law by all judges, and in all courts of justice, and in all courts and places whatsoever, to be a personal estate, and not a real estate, and shall go to the executors or administrators of the persons dying possessed thereof, and not to the heirs of such persons. See Jac. Law Dict. tit. *East India Company*. There is a copy of the charter in Coxe's Tracts in Lincoln's Inn Library.

CHAPTER IV.

OF THE JURISDICTION RESPECTING CHARITABLE USES AND TRUSTS.

SECT. I.—*Of the Prerogative of the Crown.*
II.—*Of the Commission of Charitable Uses.*
III.—*Of the Commissioners appointed for making inquiries concerning Charities.*
IV.—*Of the Visitation of Charities.*
V.—*Of Proceedings by Information.*
VI.—*Of Proceedings by Petition.*

SECTION I.

Of the Prerogative of the Crown.

1. *Of the Right of the Crown as Parens Patriæ.*
2. *Of the disposition of Charitable Funds by the King's Sign Manual.* p. 269.

1. THE protection of several interests is vested in the crown as *parens patriæ*, as in the case of charities, infants, and lunatics (*a*). It is said that the king, as *parens patriæ*, has a superintending power over all charities abstracted from, and antecedent to, the stat. 43 Eliz. c. 4; which paternal care and protection is delegated to the Court of Chancery; and therefore where persons who are named as

(*a*) *Lord Falkland* v. *Bertie*, 2 172; 4 Rep. 126; 1 Bligh, N. S. Vern. 342. See Gilb. Eq. Rep. 347, 348.

trustees of charities fail in the performance of their duties, either by death or by a disability or refusal to act, the constitution has provided a trustee in the person of the king (*b*).

Sir *W. Blackstone* (*c*) observes that "the king, as *parens patriæ*, has the general superintendence of all charities, which he now exercises by the keeper of his conscience, the chancellor; and, therefore, whenever it is necessary, the attorney-general, at the relation of some informant who is actually called the relator, files *ex officio* an information in the Court of Chancery, to have the charity properly established."

This proposition is too general: for, though it be true that where a charity is established and there is no charter to regulate it, (as there must be somewhere a power to regulate,) the king has, in that case, a general jurisdiction, yet if there be a charter, with proper powers, the charity must be regulated in the manner prescribed by the charter, and there is no ground for the controlling interposition of the Court of Chancery (*d*).

The principal, originally almost the whole, jurisdiction of a court of equity, was the administration of trusts—by protecting, not only the visible owner, who alone can proceed at law, but the individual equitably, though not legally, entitled. From that principle arose the practice of administering the trusts of a public charity. Persons possessed of funds appropriated to such purposes are within the general rule; but no one being entitled by an immediate and peculiar interest to prefer a complaint for compelling the performance of the obligations of trustees, and to enforce their responsibility, it is the duty of the crown, as *parens patriæ*, to protect property devoted to charitable uses, and that duty

(*b*) Wilmot's Notes, 24. See 2 P. Wms. 119; *Attorney General* v. *Newman*, 1 Ch. Cas. 157; 2 Ves. sen. 426.

(*c*) 3 Bl. Comm. 427.

(*d*) *Attorney General* v. *Middleton*, 2 Ves. sen. 328; *Attorney General* v. *Smart*, 1 Ves. sen. 72. See 2 Fonbl. Eq. 208, n.

is executed by the officer who represents the crown for all forensic purposes; and on that foundation rests the right of the attorney-general in such cases, to obtain by information the interposition of a court of equity (*e*).

Lord *Redesdale* said, "that the ground stated in all the books is this, that the king is to be considered as the *parens patriæ;* that he is the protector of every part of his subjects; and that, therefore, it is the duty of his officer, the attorney-general, to see that justice is done to every part of those subjects. It would be highly improper for the attorney-general, assisting in that character, to press harder upon one party than upon another. It is his duty to see that justice is done; and it was for that purpose that informations in the name of the attorney-general were permitted, for the purpose of carrying into execution charitable dispositions, or for providing for the due distribution of charitable funds. Relators were required, because the crown paid no costs. The attorney-general, prosecuting as the officer of the crown, could not be liable for costs; and a complaint might be made highly oppressive to them, unless there were some person responsible for the costs that might be incurred in consequence of that proceeding" (*f*).

2. *Of the disposition of charitable funds by the king's sign manual.*] It was established by three early cases, that where property was not vested in trustees, and the gift was to *charity generally,* not to be ascertained by the act of individuals referred to, the charity was to be disposed of, on a bill to be preferred in the attorney-general's name, not by a scheme before the master, but by the king, the disposer of such charities, in his character of *parens patriæ* (*g*).

In *Moggridge* v. *Thackwell* (*h*) Lord *Eldon* observed, "it

(*e*) *Wellbeloved* v. *Jones*, 1 Sim. & Stu. 43. See 1 Swanst. 290, 291.

(*f*) *Corporation of Ludlow* v. *Greenhouse*, 1 Bligh, N. S. 48.

(*g*) *Attorney General* v. *Siderfin*, 1 Vern. 224; *Attorney General* v. *Matthews*, 2 Lev. 167; *Clifford* v. *Francis*, Freem. 330. See 7 Ves. 75; 2 Cox, 56.

(*h*) 7 Ves. 83.

being established, that where money is given to charity generally and indefinitely, without trustees or objects selected, the king, as *parens patriæ*, is the constitutional trustee, it is very difficult to raise a solid distinction between an original gift absolutely indefinite, and without qualification, and a case in which, by matter *ex post facto*, the gift stands before the court in consequence of that accident—as if it had been originally given indefinitely, without any means for carrying it into execution prescribed."

The result, however, of an elaborate examination of all the authorities made by that learned judge was, that (*i*) the general principle, thought most reconcilable to the cases is, that where there is a general indefinite purpose of charity, not fixing itself upon any object, the disposition is in the king by sign manual; but, where the execution is to be by a trustee, with general or some objects pointed out, there the court will take the administration of the trust. And his lordship, in a subsequent case, said, that "the distinction which he adopted in the case last cited was, that where the bequest is to trustees for charitable purposes, the disposition must be the subject of a scheme before the master; but where the object is charity without a trust interposed, it must be by sign manual" (*k*).

In the *Attorney General* v. *Siderfin* (*l*), the testator, in certain events which happened, gave 1000*l.* to such charitable use as he had under his hand formerly directed. The person entitled to the estate, subject to the charge, took possession without paying it. *Christ's Hospital* having discovered the charity to the crown, on their petition, the king, by sign manual, directed the 1000*l.* to be paid to the relators, to be employed for the use of the mathematical boys of that foun-

(*i*) 7 Ves. 86.

(*k*) *Paice* v. *Archbishop of Canterbury*, 14 Ves. 372. See *Ommanney* v. *Butcher*, 1 Turn. & Russ. 270. The distinction taken by *Lord Eldon* in *Moggridge* v. *Thackwell*, has been acted upon in the recent cases of *Simon* v. *Barber*, 5 Russ. 112, and *Hayter* v. *Trego*, *Ibid.* 113. See *post*.

(*l*) 1 Vern. 224; *S. C.* 2 Freem. 330; Reg. lib. (A), 1683, fol. 340; 7 Ves. 43 n., 70, 71; 1 Mer. 59 n.

dation. On an information by the governors of the hospital to recover that sum, the defendant stated by his answer that he had diligently searched for, but could not find, any instrument in writing whereby the testator had directed the particular uses, persons, or places to which the 1000*l.* should be paid, and that if none appeared, the devise of the 1000*l.* was void. But the court declared that the 1000*l.* was well given, though there was no direction how the same should be applied, and there being no direction found for the employing thereof, it ought to be employed as his majesty had directed; and it was accordingly decreed to be paid, and ordered to be laid out in the purchase of lands, the rents whereof were to be employed for the use of the mathematical boys of *Christ's Hospital* for ever; and on payment of the sum, the decree directed that the defendant and his estate should be discharged and indemnified, in case any direction of the testator should thereafter be found, how the 1000*l.* should be paid.

In case of an indefinite charity, as to the poor in general, the application is to be settled by the king, on an information in chancery in the attorney-general's name. Where a man gave the surplus of his estate, after payment of his debts, to his executors, to be disposed of to *pious uses*, on a question whether the commissioners had power over the fund, under the statute 43 Eliz. c. 4, the court took a distinction between a gift to charity, without expressing what charity, in which case the king is the disposer of the charity, and a bill ought to be preferred in the attorney-general's name for that purpose; and a gift to charity, where no particular purpose is expressed, in which case the commissioners had power (*m*).

Where a testator by his will gave 500*l.*, to be disposed of in charity, according to the *discretion* of Dr. B., who died before he received the money, having by his will directed his brother to dispose of it according to his discretion. It was held that the crown had the disposal of the money; and the

(*m*) *Clifford* v. *Francis*, Freem. 2 Lev. 167. 330; *Attorney General* v. *Matthews*,

parties having obtained his majesty's sign manual, the court directed the money to be applied accordingly (*n*).

In the *Attorney General* v. *Herrick* (*o*), where a testator, before the statute 9 Geo. II. c. 36, devised estates to be sold to pay debts and legacies, and the surplus produce, and the remainder of the estates to be applied to charitable and pious uses generally, it appears by the register's book that all directions touching the application of the residue of the personal estate, and the produce of the sale of the real estate, and the rents and profits, were reserved until his majesty's pleasure should be known (*p*).

Where a testator, having given lands to certain charities, gave the *surplus* of his estate to the *poor indefinitely*, the word poor, in common construction, extending to all the poor in England, it was held that the disposition of the surplus charity belonged to the king (*q*).

Where the persons to whom power is given of selecting charitable objects have died without making any appointment, the power will devolve upon the crown by sign manual. Thus, where by indentures of 17th and 18th of December, 1685, estates were conveyed to trustees and their heirs upon trust, to receive certain sums therein mentioned for charitable purposes, and after all such sums had been received, the further appointment of the benefit of such fines as should be received, by renewing leases of the property, was reserved according to the direction and order of the donors and the survivor of them, during their lives and the life of the survivor, to such other workhouses, schools, or such other godly and charitable uses as they or the survivor of them should appoint; and it appeared that no further appointment was made by the donors or either of them, who had been long dead, and the sums directed received. It was

(*n*) *Attorney General* v. *Berryman*, Dick. 168.

(*o*) Ambl. 712.

(*p*) Reg. lib. A. 1772, fol. 239.

(*q*) *Attorney General* v. *Peacock*, Finch, 245; *Attorney General* v. *Sidersin*, 1 Vern. 225; *Attorney General* v. *Matthews*, 2 Lev. 167.

declared that, in the events which had happened, the right to the fines reserved, and to be reserved upon the leases of the estates comprised in the above indentures, was in his Majesty by sign manual; and the further directions as to the application of the funds was reserved until his Majesty, by sign manual, should signify his pleasure with respect to the application of the same (*s*).

The right of the crown to appoint by sign manual will not arise where the charitable purpose to which the fund is devoted has not wholly failed; and although the fund be not immediately applicable to the charitable purpose expressed by the testator, the jurisdiction of the court will remain as to the administration of the fund, either for retaining the fund until it shall become applicable to the expressed object, or for applying it to purposes approximating as nearly as may be to that expressed object (*t*). Thus in *The Attorney General* v. *The Bishop of Chester* (*u*), a legacy given towards establishing a bishop in *America* was held not to be void, though no bishop had been appointed; and the money was retained in court till it should be seen whether any such appointment would take place. Ultimately the legacy became applicable to the purpose expressed by the testator, upon the appointment of a Bishop of *Canada*, and it was applied accordingly.

We have already seen that where property is given to superstitious uses and the gift indicates a charitable purpose, that although the uses are void, the crown has power, by sign manual, to appoint the fund to some other charitable purpose (*v*); so in the case of a devise of lands to a superstitious use, it was held that there was no resulting trust for the heir-at-law, but that the king was bound to apply it to a proper use (*w*).

The Court of Chancery has long made a distinction between

(*s*) *Attorney General* v. *Marchioness of Londonderry*, Reg. lib. A. 1825, fol. 1553.

(*t*) *Attorney General* v. *The Ironmongers' Company*, 2 Mylne & Keen, 578.

(*u*) 1 Br. C. C. 444.

(*v*) *Ante*, pp. 99, 100.

(*w*) *Rex* v. *Portington*, 1 Salk. 162; *S. C.* 3 Id. 334; 12 Mod. 31. See *Attorney General* v. *Whorwood*, 1 Ves. sen. 537. In *Croft* v. *Evetts*,

superstitious uses (*x*) and mistaken charitable uses. By mistaken, are meant such as are repugnant to that sound constitutional policy, which controls the interest, wills, and wishes of individuals when they clash with the interest and safety of the whole community. Where property is given to mistaken charitable uses, the Court of Chancery distinguishes between the charity and the use; and seeing a charitable bequest in the intention of the testator, they execute the intention by varying the use, and applying the property to some charitable purpose, agreeable to law, as the king, who is the curator of all charities, and the constitutional trustee for the performance of them, pleases to direct and appoint (*y*).

In every other case, if the testator's intention cannot take effect in specie, the heir-at-law takes the estates. *Wilmot*, C. J., said, "the right of the heir seems to arise as naturally in this case as in any other; but, instead of favouring him as in all other cases, the testator is made to disinherit him for a charity he never thought of—perhaps for a charity repugnant to the testator's intention, and which directly opposes and encounters the charity he meant to establish. The ground of this doctrine is said to be this: the donation was considered as proceeding from a general principle of piety in the testator. Charity was an expiation of sin, and to be rewarded in another state; and, therefore, if political reasons negatived the particular charity given, the Court of Chancery thought the merits of the charity ought not to be lost to the testator nor to the public, and that they were carrying on his general pious intention; and they proceeded upon a presumption that the principle which produced one charity would have been equally active in producing another, in case the testator had been told the particular charity he meditated could not take place. The Court thought one kind of charity would embalm

Moore, 784, Lord Chancellor *Ellesmere*, with the advice of the other judges, set aside a conveyance to superstitious uses in favour of the heir, to whom the trustees were directed to convey. So, in an early case already mentioned (*ante*, pp. 98, 99), the decision was in favour of the heir.

(*x*) See *ante*, p. 88.

(*y*) Wilmot's Notes, 31, 32. See 7 Ves. 87.

his memory as well as another, and being equally meritorious, would entitle him to the same reward (*z*). Thus where a legacy is given to a superstitious purpose or a mistaken religious purpose, the court will not apply it to that, but will act upon the supposed intention for charity, and give it to a real religious purpose. A gift of 10*l.* a-year for a weekly sermon upon Saturday, at *St. Albans*, the preacher to be chosen by the majority of the best inhabitants, was thought a mistaken and wild charity; and the 10*l.* a-year was directed to be paid to a catechist (to be approved by the bishop of the diocese), to preach weekly at *St. Albans* on a Saturday (*a*). An annuity was devised to charitable uses intentionally, but the uses expressed were void; and therefore the court decreed it to be paid to such person as should be approved of by the Bishop of *London*, for expounding and catechising every Saturday, and the arrears being considerable, were ordered to be applied for the increase of the stipend. And a case was cited, where a pension given to silenced ministers was decreed, by the Barons of the Exchequer, to poor conforming ministers (*b*).

(*z*) Wilmot's Notes, 32, 33. The civil law contains a hint for varying the destination of a donation to the public. Digest xxxiii. *Tit.* 2. *De usu et usufr. Legatorum. De Legato Civitati ad certum usum.* 16. *Modestini. Lib. IX. Responsorum.*

(*a*) *Attorney General* v. *Combe*, 2 Ch. Cas. 18. In this case it was said that a gift to maintain a superstitious institution so long as the law would allow, was turned to a good use when the superstitious use was abrogated.

(*b*) *Anon.* 2 Freem. 40. See *Attorney General* v. *Guise*, 2 Vern. 266.

SECTION II.

Of the Commission of Charitable Uses.

1. *Of the Inquiry by Commission.*
2. *Who may be Commissioners,* p. 280.
3. *Of the Inquisition,* p. 281.
4. *Of the Decree of the Commissioners,* p. 283.
5. *Of Exemptions from the Statute of Charitable Uses,* p. 292.

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1. *Of the inquiry by commission of charitable uses.*] In the reign of Queen Elizabeth an act was passed which is commonly called the statute of *charitable uses* (*c*), said by Lord *Coke* to be a profitable law, which had produced very good effects in many cases (*d*), which authorises the issuing of certain commissions to inquire in respect of what are called charitable uses and trusts. The Court of Chancery was to issue the commission to certain persons, of whom one was to be the bishop of the diocese, with other persons selected for the purpose: and they were authorised to proceed by summoning a jury of the county where the property in question was situated, for the purpose of inquiring whether there had been any abuse, or misapplication, or mistaken application of the funds belonging to charities (*e*).

(*c*) See note, p. 2, 3, 4.

(*d*) 2 Inst. 727.

(*e*) The statute 43 Eliz. c. 4, after reciting that lands, rents, annuities, hereditaments, goods, chattels, money, and stocks of money had been given and appointed for various charitable purposes therein enumerated (see *ante*, p. 60), which had not been employed according to the charitable intent of the givers and founders thereof, by reason of frauds, breaches of trust, and negligence, in those that should pay, deliver, and employ the same, enabled the lord chancellor or keeper of the great seal of *England* for the time being, and the chancellor of the duchy of *Lancaster* for the time being, for lands in the county palatine of *Lancaster*, to award commissions into all or any parts of this realm respectively, according to their

This statute did not create a new law with respect to charitable uses, but only a new and ancillary jurisdiction by commission. The proceedings under it were made subject to appeal to the lord chancellor, who might reverse or affirm what the commissioners had done, or make such order as he might think fit for reserving the controlling jurisdiction of the Court of Chancery as it existed before the passing of that statute; and there can be no doubt that, by information by the attorney general, the same thing might have been done (*g*).

several jurisdictions as aforesaid, to the bishop of every several diocese and his chancellor and other persons, authorising them, or any four or more of them, to inquire by a jury of the county and by other means, of all gifts, limitations, assignments, and appointments aforesaid, and of the abuses, breaches of trust, negligences, misemployments, not employing, concealing, defrauding, misconverting or misgovernment of any lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money, or stocks of money theretofore or thereafter to be given, limited, appointed, or assigned for any of the charitable and godly uses before rehearsed (see *ante*, p. 60); and, after the commissioners or any four of them, upon calling the parties interested, should make inquiry by the oaths of twelve or more men of the county, who might be challenged by the parties interested, and upon such inquiry set down such orders, judgments, and decrees, in order that the charitable gifts might be duly and faithfully employed for the charitable purposes for which they were given by the donors thereof; which orders, judgments, and decrees, *not being contrary or repugnant to the orders, statutes, or decrees of the donors or founders*, should stand firm and good, according to the tenor thereof, and be executed accordingly until the same should be undone or altered by the lord chancellor or lord keeper of the great seal, or the chancellor of the county palatine of *Lancaster* respectively, within their several jurisdictions, upon complaint by any party grieved, to be made to them.

(*g*) *Attorney General* v. *Mayor, &c. of Dublin*, 1 Bligh, N. S. 347.

The jurisdiction of the Court of Chancery, by information in the attorney general's name for the establishment of charities, appears to have existed as part of the original jurisdiction of that court prior to and independently of the statute 43 Eliz. c. 4; *Attorney General* v. *Newman*, 1 Chan. Cas. 157. See 2 P. Wms. 119; *Attorney General* v. *Brereton*, 2 Ves. sen. 426; *Attorney General* v. *Middleton*, *Id.* 328; Wilmot's Notes, 24. Although Lord *Rosslyn* is reported to have said that it did not appear that the Court of Chancery, before the stat. 43 Eliz. c. 4, had cognizance upon informations for the establishment of charities. Prior to the time of Lord *Ellesmere*, as far as the tradition in times

Several proceedings were had under that act, and a long train of decisions by the commissioners is reported in an old work (*h*). Of these proceedings it is said that many were not very consonant to justice.

Commissions under this statute have long fallen into disuse, partly by their abuse and partly because they were found insufficient in prosecuting the claims in many instances; and in others, because they were extremely unjust towards the persons called upon to account for property, or sought to be charged, and because they generally ended in the Court of Chancery. The general proceeding, therefore, in cases of charities, has been for many years past (*i*) by the old mode of information in the name of the attorney-general, who brings the matter in question formally upon record, stating the claims that were made upon the individuals charged with

immediately following goes, there were no such informations for establishing the devise to the use of a charity, but they made out the case as well as they could at law; *Attorney General* v. *Bowyer*, 3 Ves. 726. See Porter's case, 1 Rep. 22.

(*h*) Duke's Law of Charitable Uses. Lond. 1676, Ed. by Bridgman, royal 8vo. 1805. See also Herne's Law of Charitable Uses, 2nd edit. 1663.

(*i*) The last commission was issued in the case of the Kirkby Ravensworth Hospital, 15 Ves. 305, 8 East, 221. The commissions and decrees are filed at the Petty Bag Office, to which reference is frequently made for ascertaining the particulars of old charities. During the first year after the passing of this statute, forty-five commissions of charitable uses were issued. From that time to the year 1643, the returns are defective, the docket-books not being in the Crown Office. From 1643 to the Restoration, there were two hundred and ninety-five commissions. The troubled state of the country during the civil wars having probably occasioned great neglects and abuses of charities, a considerable increase took place in the number of commissions, and no less than three hundred and forty-four were issued between 1660 and 1678. From that time to 1700, there were one hundred and ninety-seven; from 1700 to 1746, only one hundred and twenty-five; and from thence to the beginning of the reign of Geo. III. no more than three. So that the whole number, from 1643 to 1760, was nine hundred and sixty-four. Since the latter period, and, indeed, for twenty years before, this remedy may be said to have fallen into disuse. There were only three commissions in the reign of George III. Hans. Parl. Debates, vol. 38, p. 606. It is understood that all the inquisitions taken upon these commissions are in the Petty Bag Office.

a breach of trust, calling upon them to make a defence, and putting their defence upon record, and then having a complete issue upon the record, upon which the judgment of the Court of Chancery may be formed (*j*).

The king may name the commissioners or sign the commission, as well as the chancellor (*k*). The lords commissioners may, since the stat. 1 Wm. & Mary, c. 21, issue the commission, that act having given to them the same authority and jurisdiction which the lord chancellor or lord keeper of the great seal of *England* before enjoyed (*l*).

It was decided in a recent case, by Lord *Brougham*, that a commission of charitable uses, issued in 1649, in *Cromwell's* time, by lords commissioners, was a nullity, the only persons who, before the above statute, could issue such a commission being the lord chancellor and lord keeper; and the statute (*m*)

(*j*) 1 Bligh, N. S., 61, 62, 347.

(*k*) Duke, 144 (139).

(*l*) By stat. 5 Eliz. c. 18, it was declared that the lord keeper of the great seal should have the same powers as the lord chancellor. By 1 Will. & Mary, stat. 1, c. 21, s. 2, it was declared that the commissioners of the great seal of *England* for the time being, might use and exercise at all times, according to their commissions, as of right belonging to the lords commissioners of the great seal of *England* for the time being, all and every the same, and like offices, authority, jurisdiction, and execution of laws, and all other customs, privileges, emoluments, and advantages which the lord chancellor of *England*, or lord keeper of the great seal of *England* for the time being, of right ought to have, use, or execute, as belonging to their or either of their said offices, or otherwise howsoever, to all intents and purposes as if the said lords commissioners for the time being were lord chancellor or lord keeper of the great seal of *England*, and should have and take place next after the peers of this realm, and the speaker of the House of Commons, unless any of them should happen to be a peer, and then to take place according to his peerage.—The third section enacts that any one commissioner (in the absence of the others) may hear motions and give orders and directions touching the interlocutory proceedings in any cause, so as such one commissioner (in the absence of the others) shall not make any decrees, or put the great seal to any thing whatsoever, whereto the whole broad seal ought to be affixed, unless there be two commissioners present.

(*m*) By stat. 12 Charles II. c. 12, for confirming judicial proceedings during the protectorate, it was enacted that no inquisitions, decrees, or other legal proceedings, in any courts

which passed on the restoration of Charles II. did not give it any validity, for that act was confined to decrees and commissions, issued by the lord chancellors and lords keepers, who were put upon the same footing as those intrusted by the king with the custody of the great seal (*n*).

The commission must be under the great seal, conform to the words of the stat. 43 Eliz. c. 4 (*o*), and be awarded into the county where the land lies (*p*), or where the goods are to be employed (*q*). If land in one county is given to charitable uses in another, or if the land lies or the rent issues out of land in several counties, there must be several commissions to both counties. If the land or goods were in a county palatine and the employment out of it, or *vice versâ*, there must be a commission under both seals (*r*). Several counties might be included in one commission (*s*). If a commission be improperly issued, as not warranted by the statute, a motion may be made before the lord chancellor for quashing the commission, who, if in doubt, will direct a case for the opinion of a court of law (*t*).

2. *Who may be commissioners.*] There must be five commissioners at least, of whom the bishop of the diocese if *in esse* must be one (*v*), otherwise the commission will be void (*u*); but a bishop elect need not be named if he be not

or by commissioners of charitable uses, since May 1, 1642, should be avoided for want of legal power in the courts, judges, or commissioners.

(*n*) *Attorney General* v. *Governors of Atherstone School*, Chancery, 8 Aug. 1834. See Duke, 144 (139).

(*o*) Duke, 144—146.

(*p*) Duke, 145.

(*q*) Duke, 149 (144).

(*r*) Duke, 145, (140); Com. Dig. Uses (N. 14). By stat. 11 Geo. IV. & 1 Wm. IV. c. 70, s. 14, it is enacted that all the power, authority, and jurisdiction of the Court of Session of the county palatine of *Chester* and of the judges thereof, and of the Court of Exchequer of the same county, and of the chamberlain and vice-chamberlain thereof, and also of the judges and Courts of Great Sessions, both in law and equity, in the principality of *Wales*, should cease and determine upon the 12th Oct. 1830.

(*s*) Duke, 147 (143).

(*t*) *Ex parte Kirkby Ravensworth*. 15 Ves. 308. *S. C.* 8 East, 221.

(*v*) Duke, 117, 145, 146 (140).

(*u*) Duke, 63.

consecrated; nor a suffragan, nor a consecrated bishop, if he is concerned in interest, as if the goods of an intestate given to charitable uses, are in his hands as ordinary until administration granted (*w*). If the bishop be named, any four of the other commissioners may act without him (*x*).

Any one of good fame may be a commissioner, even an *alien* friend, or a person indicted for a petty misdemeanor, as a riot, &c., or an outlaw, if the outlawry has been reversed, for that disaffirms the outlawry; so a citizen or burgess, though the charitable use is for the benefit of his own city or borough (*y*).

The stat. 43 Eliz. c. 4, requires the commissioners to be of good and sound behaviour; and therefore a person convicted of treason or felony, is disqualified to be a commissioner, as well as one convicted of cosenage, barretry, simony, &c., or of acquitting a felon against evidence; neither one outlawed or excommunicated at the time of the commission, though afterwards pardoned and absolved; nor an infant at the time of the commission, though he afterwards comes to full age, can be a commissioner (*z*).

The act provides (*a*), that no person shall be a commissioner or juror who has any part of the lands or goods in question; and a person interested as an executor or administrator of the goods given, is disqualified for a commissioner (*b*). So a person claiming the lands given in remainder or reversion, or a member of a particular corporation to whom the charity is given, as one of the *Mercers' Company*, &c., where the gift is to such company, is disqualified for the office of commissioner or juror (*c*).

3. *Of the inquisition.*] The commissioners ought to summon the parties interested in the lands or chattels before them (*d*), and it is proper to require the attendance of the

(*w*) Duke, 145, 146 (141).
(*x*) Duke, 63 (117).
(*y*) Duke, 117, 145, (141).
(*z*) Duke, 145, (142).
(*a*) 43 Eliz. c. 4, s. 5.
(*b*) Duke, 146.
(*c*) Duke, 147 (143); Com. Dig. Uses, (N. 15).
(*d*) Duke, 151 (147).

parish officers as churchwardens and constables. Four of the commissioners are to send their warrant to the sheriff, to summon a jury to attend at a certain time and place. At the execution of the commission, the parties interested in the matter in question may challenge any of the jurors; none ought to serve who are interested. The jury are to find and return the facts of the case to the commissioners by an inquisition in writing on parchment (*e*).

The commissioners may make inquiry by all lawful means as to gifts, &c., by examination of witnesses, rentals, accounts, prior inquisitions, an inscription upon the donor's tomb, or by the commissioners' own knowledge. And by such means, may supply a defect in the circumstances found by the jury, as that a gift for poor tradesmen was for those of a particular sort; that the misemployment was for so long a time. It is sufficient if twelve jurors agree, though sixteen are impanelled (*f*); so an inquisition will be good though it does not find all the circumstances of the gift, if the substance be found; as if the gift be found *quibusdam ignotis*, or *per quendam ignotum*. So if it be found varying in circumstances from the truth; as if it be found to be made by fine, feoffment, &c., when it was by will or other conveyance. So it is sufficient if the inquisition finds the general use, though it varies from the particular; as if it finds a gift for books for poor scholars, when it was for gowns for them; for the gift for poor scholars is the general use; or for stones for a highway, where the gift was for gravel—or finds for poor scholars generally, where it was for poor scholars in the university—or a gift for such an use, where it was for such and other uses, it is sufficient for so much (*g*).

But the inquisition must be taken within the county where the land lies (*h*), or where the commissioners have authority. If the land lies in several counties, there must

(*e*) Duke, 117. See forms of Inquisitions, Duke, 12—20, (21—52.)

(*f*) Duke, 150, (146, 147).

(*g*) Duke, 150, (145, 146); Com. Dig. Uses, (N. 16.)

(*h*) Duke, 119, 120, 148, 149, (144).

be inquisitions taken in all—or if a commission goes only to one, an inquisition may be taken afterwards upon another commission in the other (*i*). The commissioners cannot inquire by the oath of the party himself, or by illegal evidence, as a deed cancelled, or record reversed, &c. (*j*) So an inquisition must find the gift, and also the abuse, otherwise it will be imperfect; it must find the use truly, otherwise it is void; as if it finds a gift for poor scholars, where it was for soldiers—or a gift for a highway, where it was for poor virgins (*k*).

4. *Of the decree of the commissioners of charitable uses.*] The decree must be made by such of the commissioners as were present when the inquisition was taken (*l*).

Sir *F. Moore* observes, "that the commissioners are restrained to three things in making their decrees and orders: 1st, that it tend and conduce to the employment of the things given; 2nd, that the employment be faithful; 3rd, that the employment vary not from the use and intent for which the thing was given. These three things being observed, the commissioners have power and authority to do five things more: 1, they may establish the property of the thing given in the person to whom it was given, or they may transfer it from one person to another; 2, they may supply the defects of the gifts or employments in certainties, circumstances, and decencies; 3, they may ordain conveyances or assurances to be made for the better employment of the case; 4, they may add decencies in the employment for the honour of the donor; 5, they may impose penalties for misemployments" (*m*).

The decree must direct the employment of the land or goods according to the intent of the donor; and an agreement by the parishioners, where several charities were given for different purposes, cannot divert them to other uses; as where one farm was given for repairing the church, another

(*i*) Duke, 148, (144).
(*j*) Duke, 150, (147).
(*k*) Duke, 149, (145); Com. Dig. Uses, (N. 17.)
(*l*) Duke, 154 (152); *contra*, 68—118. See Forms of Decrees, Duke, 21—33, (53—90).
(*m*) Duke, 155 (153).

for mending the highways, and another for the poor, it was held to be a misemployment to apply the rents in finding a preacher to officiate in the parish (*n*).

So if the gift was for persons of a particular sex, nation, trade, quality, or profession, the decree could not order the employment to persons of another sex, &c. &c. So if the employment was appointed to be upon the poor of one parish or the parishioners of one parish, or the prisoners of one prison, or the scholars of one grammar-school with certainty, the commissioners had not power to decree it to the poor of another parish, to the prisoners of another gaol, nor to the scholars of another school, for that were contrary to the donor's intent (*o*).

If the gift fixes the number of objects, the decree could not alter it; and if the gift was for a particular purpose, as for diet, apparel, house of correction, ease of fifteenths, &c. the decree could not direct the application to other purposes, though the land had much increased in value. Where the donor appointed the application to be in money (*p*), meat, or apparel, the commissioners could not change the employment (*q*).

But if the use was limited for a chaplain, they might decree, by addition, that the chaplain should be a preacher; so they might appoint the nomination of him to a man of science, as a master of a college, &c., because such things concur in decency and order with the intent of the founder (*r*). If the use was limited for the relief of a certain number of soldiers, the commissioners might, by their decree, add a surgeon or physician, and allow him fees (*s*). So where the gift was for the relief of the poor, the decree might direct hemp, iron, &c. to be provided for setting the poor at work (*t*).

If houses given to charitable uses be suffered to be out of repair by negligence, the commissioners might decree those in receipt of the rents to repair them, although they had otherwise expended the rents in performance of the cha-

(*n*) *Man* v. *Ballet*, 1 Vern. 43; Duke, 158 (156).
(*o*) Duke, 157, 158 (156).
(*p*) Duke, 158, 160, 58.
(*q*) Duke, 158 (157).
(*r*) Duke, 157 (155).
(*s*) Duke, 158 (156).
(*t*) Duke, 158 (157).

ritable use, and might order the houses to be kept in repair as often as necessary; and the commissioners might order the real and personal representatives of those who ought to have repaired, to do the repairs if they had assets (*u*).

Although a lessee might cut down trees for repairs, the commissioners might award damages for waste (*v*).

If a fraudulent lease or conveyance was made by the trustees of a charity, the commissioners might decree the same to be void, both in interest and estate; but if upon appeal the lord keeper annulled the commissioners' decree, or decreed the lease or conveyance to be good, the estate and interest were revived (*w*). A lease granted at an undervalue might be decreed by the commissioners to be void; and that the lessee should pay the real value of the land above the rent reserved (*x*).

The commissioners of charitable uses could make a decree against a corporation for the performance of charitable uses (*y*); so they could enable trustees, in whom lands were vested for charities, to demise them at the best rent (*z*); and when a certain number of the trustees were dead, might order the survivors to make a conveyance to settle the said lands in the survivors and others, to keep up the number of those appointed (*a*). So on a breach of trust by the heir or others, charged with a charitable use, the commissioners might transfer the trust unto others, as to the churchwardens or other parishioners of the parish, where the charitable use was to be distributed (*b*).

The commissioners had power to decree damages for the detention of money given to charitable uses, and costs to the party prosecuting a commission for reforming a breach of trust (*c*).

The decree of the commissioners bound all, whom the donor

(*u*) Duke, 63.
(*v*) Duke, 67.
(*w*) Duke, 63, pl. 2.
(*x*) *Eltham* v. *Warreyn*, Duke, 67 (640).
(*y*) Duke, 63, 64.
(*z*) *Inhabitants of Eltham* v. *Warreyn*, Duke, 68, (640).
(*a*) Duke, 63.
(*b*) *Hide's* Case, Duke, 77 (635).
(*c*) Duke, 67. See *post.*, p. 287.

by his act or conveyance could have bound, as his heir claiming by descent (*d*); but not persons claiming *paramount* the gift or devise to the charity. Thus if a tenant in fee-simple made a feoffment, upon condition to perform a charitable use, and his heirs entered for breach of the condition, they were bound by the commissioners' decree; but if a tenant in tail made a gift upon condition to perform a charitable use, and his heir entered for breach of the condition, he was not bound by the decree, because the donor could not bind him; yet if tenant in tail, having issue, took another wife and created a discontinuance, and took back an estate in special tail to the heirs of their two bodies, and then made a gift to perform a charitable use, if the heir entered he was bound by the decree until the first issue recovered. If there was lord and tenant, and the tenant made a charitable gift and died without heir, the lord claiming the land by escheat was bound by the decree of the commissioners (*e*). So if a lease was made to a charitable use, and the lessee committed a forfeiture by feoffment, &c., if the lessor entered for the forfeiture, he was bound by the decree during the term. If a man disseised the feoffee to a charitable use, and purchased a collateral warranty which descended upon the feoffee, yet the disseisor was bound by the decree, because the collateral warranty was but a bar by estoppel, and a charitable use is never bound by estoppel. If a tenant of land given to a charitable use levied a fine, and five years passed, yet the decree bound the tenant of the land, because the use is not an interest in the lands; and the statute of uses, 27 Henry VIII. c. 10, was made after the statutes 1 Rich. III. c. 7, and 4 Henry VII. c. 24, which bind rights. If the heir of the disseisor was in by descent of lands given to a charitable use, yet he was bound by the decree, for no laches of entry ever destroyed a charitable use, nor any thing barred it but a conveyance to one upon good consideration, and without fraud or notice. Neither was a charitable use bound by the periods of time mentioned in the statutes

(*d*) Duke, 160; Ch. Cas. 267; Com. Dig. Uses, (N. 23.)

(*e*) Duke 160, 161 (159, 160). See 4 & 5 Wm. IV. c. 23, *post*.

of limitation (*f*). A remainder limited to a charitable use expectant upon the determination of a preceding estate tail, was barred by a recovery duly suffered by the tenant in tail (*g*).

If a feoffee to a charitable use conveyed the land to one for life, with remainder to the king, the king was bound by the decree of the commissioners, because the use was limited before the title of the king (*h*).

It was resolved, in an early case, that the commissioners could give costs to the party prosecuting the commission for reforming a breach of a charitable trust; and that the lord keeper might increase such costs if the party complained without cause (*i*). But it is said, in subsequent cases, that the commissioners of charitable uses could not decree costs under the stat. 43 Eliz. c. 4, although, on appeal, the lord chancellor might decree the costs, not only of the appeal, but of the commission; and either increase or lessen the costs, or exempt the party from them altogether (*j*). If the founder appointed the profits of land for a certain number of poor, and that every one should receive a certain sum, the commissioners might increase the allowance; but if the founder had limited the number of poor to be benefited, the commissioners could not add more. Where the appointment of the master of a free school was given by the founder to his heir, the commissioners might decree that he should be a man of science, it being consistent with the founder's intent to have one of sufficiency; and if the heirs of the founders failed, the commissioners might decree the right of nomination to others, for it could not escheat to the lord (*k*).

A voluntary contribution by soldiers and mariners out of their wages, to be employed for the relief of maimed soldiers and mariners, their wives and children, which had been

(*f*) 32 Henry VIII. c. 2; 21 Jac. I. c. 16; Duke, 161 (160). See 3 & 4 Wm. IV. c. 27.

(*g*) Duke 161 (160).

(*h*) Duke 162 (161).

(*i*) *Eltham* v. *Warreyn*, Duke, 67.

(*j*) *Rockley* v. *Keyly*, 1 Eq. Cas. Abr. 126: *Aylet* v. *Dodd*, 2 Atk. 238. See *Wharton* v. *Charles*, Rep. Temp. Finch, 81; *East* v. *Ryal*, 2 P. Wms. 284.

(*k*) Duke, 157 (156).

paid into the hands of a trustee, and detained by him twenty years, was decreed by the commissioners of charitable uses and confirmed by the lord chancellor (*l*).

Where lands were devised to the poor people maintained in an hospital at *Reading*, who not being incorporated, were incapable of taking, it was decreed, that the lands should be assured to the mayor and burgesses for the maintenance of the hospital (*m*).

Although a parson and churchwardens are not a corporation out of London for taking lands (*n*), a devise to them and four others to sell lands, and to employ the money for charitable purposes, was held to give the commissioners sufficient authority to sell the same (*o*).

The commissioners could not by their decree enable a corporation, not before incorporated, to take for charitable uses as a corporation (*p*); nor confirm leases, nor release debts, nor stocks of money, nor remit arrears, nor decree that land should be leased at an undervalue, either with regard to the fine or the rent, nor direct a lease to be made to their friends, nor ordain that their own servants should be the objects of the charity (*q*).

If lands were given to charitable uses, and the donor appointed trustees and likewise visitors, to see the trust performed, the commissioners could not by virtue of the statute 43 Eliz. c. 4, intermeddle; but if visitors were also trustees, then the commissioners had jurisdiction (*r*).

Power might be given by a commission of charitable uses for enabling the commissioners to make bye-laws for the better regulating and preserving charities; and if the power given was too extensive and tending to the overturning of the charities, it was void only *pro tanto* (*s*).

(*l*) *Sir T. Middleton's* Case, Duke, 74 (570); *S. C.* Moor, 889.

(*m*) *Mayor, &c., of Reading* v. *Lane*, Duke, 81 (361).

(*n*) *Ante*, p. 28.

(*o*) *Champion* v. *Smith*, Duke, 81, (622).

(*p*) Duke, 63.

(*q*) Duke, 156 (154).

(*r*) Case of *Sutton Colefield*, Duke, 68 (642); *Hynshaw* v. *Corporation of Morpeth*, Duke, 69 (242).

(*s*) *Eden* v. *Foster*, 2 P. Wms. 327: *S. C.* Gilb. Eq. Cas. 182.

The commission and decree of the commissioners of charitable uses were returned into the Petty Bag Office, whereupon the defendant was served with a writ of execution (*k*).

The party aggrieved by the decree might stay the proceedings by taking exceptions to it before the lord chancellor (*l*). So after exceptions by a lessee had been overruled, the lessor might take exceptions (*m*).

A person who was interested might except, and one who had been summoned to appear before the commissioners, but did not, was allowed to take exceptions to their decree (*n*).

But if the defendants did not except upon being served with a writ of execution, but submitted to the decree, they were bound, and could not afterwards except (*o*).

If exceptions were taken and disallowed, the decree was confirmed; after which, the chancellor might award execution according to the usual practice of the court. The most usual course was, to make a writ of execution upon the statute; and afterwards, an attachment with imprisonment until performance of the decrees, or an *elegit*, or *fieri facias* might be awarded (*p*). If the decree transferred the property of the land or goods to another, the party in whose favour the decree was made, might enter or take them without a writ of execution; where a lease was decreed to be void, the reversioner might enter (*q*).

If the decree appear to be out of the powers of the commissioners, contrary to the statute or common law, or ecclesiastical law, or intent of the donor, the chancellor may annul it (*r*). So upon suggestion without bill it might be annulled, if made without authority; as if the precept was only by three commissioners, or there was no inquisition (*s*). But if the decree was only voidable, it could not be annulled

(*k*) *Parish of St. Dunstan* v. *Beauchamp*, 1 Ch. Cas. 193; 2 Atk. 550.

(*l*) 1 Vern. 42; Duke, 164.

(*m*) *Corpus Christi College, Oxon* v. *Parish of Nauston*, 2 Vern. 507.

(*n*) *Rawson* v. *Turner*, Sel. Cas. Ch. 42; *S. C.* 2 Eq. Cas. Abr. 202, pl. 5.

(*o*) *Parish of St. Dunstan* v. *Beauchamp*, 1 Ch. Cas. 193; 1 Vern. 42.

(*p*) Duke, 166 (166).

(*q*) Duke, 164 (164).

(*r*) Duke, 164 (165).

(*s*) Duke, 163 (163, 164).

without bill, as if the party were not summoned, or a legal challenge was disallowed (*t*). So a suggestion of an irregularity, not apparent upon the record, must be made in writing, and be proved immediately, otherwise execution shall not be staid (*u*). So execution shall not be staid if the matter suggested is only irregularity; as disproportion of allowances (*v*). So it shall not be annulled for matter arising after the decree; as if assets fail after a decree against an executor or administrator, for it was his default it was not performed before (*w*).

The statute 43 Eliz. c. 4, s. 9, having declared "that the lord chancellor or lord keeper shall and may take such order for the due execution of all or any of the said judgments, decrees and orders, as to them shall seem fit and convenient," the Court of Chancery has considered proceedings on exceptions to a decree of the commissioners, as an original cause; in which the *exceptants* are considered as plaintiffs, and the *respondents* as defendants, who put in an answer upon oath; and in the examination of witnesses in such a cause, neither side is bound by what appeared before the commissioners, but may set forth new matter if they think proper (*x*). The proceedings are to be treated as an original cause in equity (*y*).

An issue-at-law to try whether certain lands belonged to a charity, was directed upon a re-hearing of exceptions taken to a decree made by commissioners of charitable uses after such decree had been twice confirmed (*z*).

If the gift was general for the maintenance of a school, and the decree was made for a grammar-school, the lord chancellor might alter the decree, and appoint it for a writing-school. If the donor gave money to be lent to poor tradesmen, and the decree limited the time they should have it, the lord chancellor might limit a longer or shorter time for

(*t*) Duke, 163.
(*u*) Duke, 164 (165).
(*v*) Duke, 163 (164).
(*w*) Moor, 823, Com. Dig. Uses, (N. 27).
(*x*) *Corporation of Burford* v. *Lenthall*, 2 Atk. 550.
(*y*) 3 Bl. Comm. 427, 428.
(*z*) *Corpus Christi College, Oxon* v. *Parish of Newnton*, 2 Vern. 507.

the loan. But if the gift was to make a causeway in a certain place, and it was decreed accordingly, the lord chancellor could not alter the place; but he might change the employment from a causeway to making a bridge if he thought fit, because the passage was the principal, which being observed, it was in the chancellor's discretion to appoint whether a bridge or a causeway was the most proper. If the donor ordained that the relief should be given in bread, and it was decreed accordingly, the lord chancellor could not alter the relief to be given in money, for the kind should be charged. So if the relief was appointed to be given at Christmas, a decree made accordingly, could not be altered to another feast, because the honour of the particular feast seems essential to the gift. So if the gift and decree were for such poor as should come and hear a sermon at *St. Paul's*, it could not be altered to *Westminster*, for the place is material (*a*).

When the lord chancellor had altered or confirmed a decree made under the statute 43 Eliz., it was to remain in the Petty Bag Office; and he had power to make a decree good which was defective (*b*). So if the commissioners by their decree directed payment of a certain sum, the chancellor might increase it (*c*). The commissioners paid no costs unless they had with design acted vexatiously.

An objection to a decree under a commission of charitable uses, as having issued in a case not warranted by the statute 43 Eliz. c. 4, as where the commissioners have no authority to act, may be in the form of exceptions (*d*).

The master of the rolls refused to hear an appeal from a decree of the commissioners of charitable uses (*e*).

But it seems that the appeal comes before the lord chancellor personally, and not in his ordinary or extraordinary

(*a*) Duke, 169 (170, 171).

(*b*) *East Greenstead* v. *Howard*, Toth. 29; *S. C.* Duke, 79 (638).

(*c*) Duke, 32.

(*d*) *Ex parte, Kirkby Ravensworth Hospital*, 15 Ves. 305.

(*e*) *Rockley* v. *Kelley*, Prec. Ch. 111.

jurisdiction; though the commission is returned into the Petty Bag Office, which retains the proceedings (*f*).

After much debate it was decided by the judges, that a bill of review will not lie after an appeal to the chancellor, for the decree is conclusive and not to be further examined, because it derives its authority from the stat. 43 Eliz. c. 4, and is not similar to a decree made by the chancellor in his ordinary jurisdiction (*g*). It was said, that no appeal lies to the House of Lords from a decree on the stat. 43 Eliz. c. 4, for they cannot have any original jurisdiction, because the commission is grounded upon the act of parliament, which gives no appeal (*h*).

But in one case, an appeal was received in the House of Lords from a decree overruling exceptions taken by the appellant, to a decree made by the commissioners for charitable uses (*i*).

5. *Of exemptions from the statute of charitable uses.*] The two universities, cities, and corporate towns, and charities having visitors, were exempted from the inquiries of the commissioners of charitable uses. The statute (*k*) provides, that nothing therein contained shall extend to any lands, tenements, rents, annuities, goods, chattels, money, or stocks of money, given to any college, hall, or house of learning within the Universities of *Oxford* or *Cambridge*, or to the colleges of *Westminster*, *Eton*, or *Winchester*, or to any cathedral or collegiate church; and that it shall not extend to any city or town corporate, or to any lands or tenements, given to charitable uses within any city or town corporate

(*f*) *Corporation of Burford* v. *Lenthall*, 2 Atk. 552.

(*g*) *Windsor* v. *Farnham*, Duke, 62 (634); *S. C.* Cro. Car. 40; W. Jones, 147; *Pidgeon's* Case, Cro. Car. 351. See 2 Vern. 741, note by Raithby.

(*h*) *Saul* v. *Wilson*, 2 Vern. 118; 1 Wood, Lect. 237.

(*i*) *Warner* v. *North*, Show. P. C. 110; *S. C.* Herne, 119. See *Eastham* v. *Kemp*, Duke, 62 (635); 3 Bl. Comm. 428.

(*k*) 43 Eliz. c. 4, ss. 2, 3, 4.

where there is a special governor or governors appointed to govern or direct such lands, tenements, or things disposed of to the uses aforesaid; neither to any college, hospital, or free school which have special visitors, or governors or overseers appointed to them by their founders; and that the act should not be prejudicial or hurtful to the jurisdiction or power of the ordinary.

Lord *Hardwicke* said, "the construction of this proviso is, that where a college, hospital, or school is founded, and a special visitor appointed, or a visitor by operation of law, the commission, by virtue of that statute, will not interfere" (*l*).

This proviso being construed strictly, was held to extend only to corporations *in esse* at the time of making the statute, and not to such as should be made after, nor to lands, &c., which are given after the making of the statute, though the corporation, &c. were in being at the time the act was made; nor to goods and chattels given to cities, &c., because lands only are mentioned in the proviso; but that it extended in equity to inferior or petty corporations, as companies of mercers, grocers, &c. in a greater corporation, as the city of *London;* and though colleges only are mentioned, it includes the body politic of the whole university (*m*).

It is laid down by Sir *F. Moore*, that three things are requisite to bring a case within the proviso; 1. That the gift be made to a body politic, not a part or principal member, as to the dean and chapter, and not to the dean alone; 2. Not only the use but the employment also must be limited to a corporation, yet if the gift be to the chief or grand corporation, and the employment limited to an inferior corporation within it, it shall be exempted; 3. The corporation, overseers or governors must, in order to come within the proviso, have power to execute and employ the use in as ample a manner as the commissioners may do, otherwise the latter may interfere.

A gift to a college, to pay 20*l.* unto the parson to distribute

(*l*) *Attorney General* v. *Governors of Harrow School*, 2 Ves. sen. 551. See sect. 3, *post.*

(*m*) Duke, 171 (172).

amongst the poor of his parish, is not within the proviso, because the college has no power to compel the parson to distribute the money; but if the gift be to a city, to be employed by the mayor, or to one corporation to be employed by another corporation, as a town or city, this is within the proviso, because both the property and the employment are appointed to a corporation, though several, and shall not amount to as much as if both were one.

If the corporation can deal but for part, the commissioners shall have jurisdiction for the whole, *majus dignum trahit ad se minus dignum.* If a gift be made at this day to an hospital, which hath a governor appointed by the founder, and the gift be for increase of relief of the poor, this increase is exempted, as well as the foundation, from the jurisdiction of the commissioners.

An hospital in reputation is exempt, as well as if it were a corporation, if it have a governor appointed by the founder; and, therefore, a gift to the poor knights of *Windsor* for increase of their allowance, is exempt, because they have the dean and canons, who are supervisors, for the founder; and although they are otherwise provided for, yet, because they live upon alms, a gift to them is within the statute 43 Eliz. c. 4 (*n*).

The exemption extends to the Company of Mercers, Grocers, &c. in *London*; to a gift made to a corporation, to be employed in another corporation, or to be employed by the mayor of the same corporation (*o*).

Where King Edward VI. founded a free school in *Chelmsford*, and made it a corporation of guardians, master, and usher, and gave chauntry lands to them and their successors, for the maintenance of the master and usher of the school and of poor people, and directed that the rents should be employed for those purposes and not otherwise, and appointed four individuals, and the heirs male of their bodies, governors of the said free school and lands, a decree by the commis-

(*n*) Duke, 172 (173). Uses, (N. 19).
(*o*) Duke, 171 (173); Com. Dig.

sioners of charitable uses against the governors for a breach of trust, in making a profit of the lands, was reversed, as the case came within the above proviso; and it was ordered that a bill should be exhibited against the visitors and governors, and that upon proof of their breach of trust relief should be given to the school and poor, according to the founder's intent (*p*).

But if land be given to a corporation or other particular persons, to perform a charitable use, and the donor appoint them visitors also of the use according to his intent, if the visitors do break the trust, either in detaining part of the revenue, misemploying, or any other ways defrauding the *charitable use*, this may be restored by decree of the commissioners, notwithstanding this proviso in the statute—for the intent of the statute is to disable commissioners to meddle with such a case; where the land is given to persons in trust to perform a charitable use, and the donor appoint *special visitors* to see these trustees perform the use according to his intent, if the trustees defraud the trust the commissioners cannot meddle, but the visitors are to perform it; but where the *visitors* are *trustees also*, then the commissioners may, by their decree, reform the abuse of the charitable uses (*q*).

Where lands were given to the mayor and commonalty of *Morpeth*, for maintaining a schoolmaster there, who were appointed visitors of the schoolmaster and scholars, the case was held to be within the jurisdiction of the commissioners: for the visitors being trustees and breaking the trusts, were not within the intent of the proviso, for otherwise there would be no remedy for the breach of trust, except in chancery or in parliament (*r*).

A limited power of visitation, which may be given by the founder of a charity, will not deprive the commissioners of charitable uses of their jurisdiction; therefore, where the

(*p*) *The Poor of Chelmsford* v. *Sir H. Mildmay*, Duke, 83 (574).

(*q*) Case of *Sutton Colefield*, Duke, 68 (642).

(*r*) *Hynshaw* v. *The Corporation of Morpeth*, Duke, 69 (242).

founder of an hospital directed that if, in making up the accounts of the wardens biennially going out of office, any doubt should arise which could not be decided by the new wardens, &c., the ordinary should decide it; and also gave to him the appointment of a master, upon the default of other persons to appoint within certain times, and power to correct or remove the master for certain causes, and also power to sequester the profits of the wardens, &c., in case of the improper subtraction of a certain sum, directed to be kept in a chest for special purposes, until the money was replaced; and also gave to him the power of interpreting the statutes, in case of any doubt; and the founder also delegated to the dean and chapter of *York*, power to remove the wardens, &c. consenting to mortgage or alienate the lands of the charity.

The Judges of the Court of King's Bench, certified their opinion, in a case from the Court of Chancery, "that there was not any visitor, governor, or overseer of the said hospital appointed, within the intent and meaning of the statute 43 Eliz. c. 4, so as to exclude the application of the powers granted by that act" (*s*).

Lord *Eldon* acted on that certificate, upon the ground that the words of the statutes did not give the whole visitatorial power, and that there was enough in the context to show that the visitatorial power, as to the administration of the landed property, was not intended to be given to the ordinary as visitor (*t*).

Purchasers for valuable consideration.] The act provides (*u*) that no purchaser for valuable consideration of any estate or interest in lands, rents, annuities, hereditaments, goods, or chattels given to charitable uses without fraud, having no notice of the charitable use, should be impeached by any decrees of the commissioners, who were nevertheless authorized to decree recompence to be made by persons, who

(*s*) The case of *Kirkby Ravensworth Hospital*, 8 East, 221; *S. C.* 15 Ves. 305.

(*t*) *S. C.* 15 Ves. 305.

(*u*) 43 Eliz. c. 4, s. 6.

being in trust, or having notice of the charitable uses, had broken the trust, or defrauded the use by any conveyance, lease, &c.

If a purchaser, for valuable consideration, of land given to charitable uses, has legal notice of the use, and afterwards sells the land to another for money, who has no notice of the use, the second purchaser will hold the land chargeable with the charitable use, because the first purchaser held it so, and the second purchaser, coming under his title, must hold it subject to the charges to which the first purchaser held it, because he claims under him; but if the first purchaser had no notice of the use, then is the land discharged of the charitable use; and if he afterwards sell it to another for money, that hath notice of the use, yet he shall not hold subject to it, because the land was discharged from it upon the first purchase (*v*).

Persons claiming as tenant by the curtesy or dower, were bound by the charitable use, if the parties under whom they claimed had notice. So was the lord claiming by escheat, under a tenant who had notice; besides the lord was not a purchaser within the proviso (*w*).

The notice, in order to bind a purchaser of lands charged with a charitable use, must be certain; a general notice is not sufficient (*x*). Thus where land given to charitable uses was intended to be sold by act of parliament, and when the bill was read, it was declared that the land was charged with a charitable use, and an offer was made to secure the charity by other means. The bill not having passed, the land was afterwards sold to one of the members of the house, who spoke in the debate on the bill; but this was held not to be sufficient notice, because it was not known to the purchaser, except as a member of parliament. It is said that any general information is sufficient, as sometimes the general name of the land gives a competent notice; as if it be called the church land, or the highway land, or the hospital land, &c., the notice of

(*v*) Duke, 65; *Sutton Colefield* Case, *Id.* 68 (643); *East Greensted's* Case, Duke, 64 (638). See Sugd. V. & P. 2nd vol. 183, 9th ed.

(*w*) Duke, 173 (175).

(*x*) *East Greensted's*, Duke, 65 (638).

such a name gives an information of the use (*y*). Notice to a purchaser after the agreement, and before the execution of the conveyance, will, as in other cases, be binding upon him (*z*).

The words "valuable consideration" in this statute were construed strictly; therefore if a man, having lands given to a charitable use, settled them, in marriage with his daughter, on one who had no notice of the use, the commissioners might decree such gift in marriage to be void, and dispose of it to the charitable use: for the advancement of the daughter in marriage was not a valuable consideration within the statute (*a*).

The consideration was held insufficient to protect a purchaser, if the sale was executory, or for things of show or arbitrary worth, as jewels, &c. or mixed as money and natural affection, or a mere possibility in land, or the payment of the vendor's debts, or portions of his daughters (*b*).

If a rent-charge be granted out of land to a charitable use, and the land is afterwards sold for valuable consideration of money or land to one that had no notice of the rent, yet the rent remains, for the purchase was of another thing, that was not given to the charitable use (*c*). A rent-charge settled to a charitable use goes with the land, in whose hands soever it comes, and a distress may be made for the arrears upon the terre-tenant for the time it was in arrear in other hands, and the remedy of the owners is by bill in equity, for contribution against the persons who enjoyed the land before him (*d*); but it was said that where land or rent is given to a charitable use and misemployed, a purchaser, with notice of the gift, was not to be farther charged than for his own time; but where the rent was concealed, a purchaser shall answer for all the

(*y*) Duke, 181.

(*z*) *Inhabitants of Woodford* v. *Parkhurst*, Duke, 70 (378). On notice in general see Powell on Mortgages, by Coventry, chap. xiv.; Sugd. V. & P. 2nd vol. 276—302. 9th ed.

(*a*) Duke, 177 (158).

(*b*) Duke, 177 (158).

(*c*) *East Greensted's* Case, Duke, 64 (638); *Hide's* Case, *Id.* 77 (635).

(*d*) *Inhabitants of Woodford* v. *Parkhurst*, Duke, 70 (378).

time of the concealment: for the land is a debtor and passes subject to the charge (*e*); but, in another case, it is said that the purchaser shall only be liable to the arrears in his own time (*f*). It is said (*g*), "the correct distinction seems to be, that where the rent-charge is legal, it must, like every other *legal* incumbrance, bind the purchaser, although he purchased without notice; but where there is a mere equitable charge, the commissioners shall not make any decree for payment of it against the purchaser, if he purchased without notice."

Where a rent was granted out of lands in *several* counties for charitable uses in *one* county, the commissioners appointed for the latter might make a decree to charge the lands in other counties, to pay an equal contribution of the rent, without several inquisitions in each county, because the rent is entire (*h*). The commissioners are to charge such a rent by the decree, upon all the lands in every county, according to an equal distribution, having regard to the yearly value of all the lands chargeable with the rent; and cannot, by their decree, charge one or two manors with all the rent, and discharge the residue in other counties or places: for such a decree would be contrary to the will of the donors (*i*); but the commissioners could not convert a rent-seck into a rent-charge, by adding a clause of distress (*j*). A power of distraining for a rent-seck is now given by stat. 4 Geo. II. c. 28, s. 5.

A purchaser without notice of land which was subject to a rent-charge given to a charity, was relieved from so much of the arrears as had not accrued during the time he had been in possession, and from costs decreed by the commissioners (*k*).

Where a decree was made by the commissioners in favour of a town, and the defendant possessed some lands, liable to

(*e*) *Hide's* Case, Duke, 76.

(*f*) *Peacock* v. *Thewer*, Duke, 82 (589); *S. C.* Toth. 33.

(*g*) 2 Sugd. V. & P. 182, 9th ed.

(*h*) *East Greensted's* case, Duke, 54 (635). See *Attorney General* v. *Jackson*, 11 Ves. 365, *post*.

(*i*) Duke, 65.

(*j*) *Hide's* Case, Duke 77 (635).

(*k*) *Wharton* v. *Charles*, Finch, R. 81.

the payment of the money decreed, it was held, that the whole might be laid upon any one liable, and that a commission should issue to inquire who were chargeable with the money decreed, in order that the part to be paid by each might be apportioned (*k*).

If the devisees of a rent charge, or the grantees thereof to a charitable use, purchased part or even the whole of the lands, out of which the rent issued, although at law, the rent charge was extinguished (*l*); yet, if the commissioners decreed the rent to be revived, and settled it upon others to maintain the charity, the rent was restored (*m*).

SECTION III.

Of the Commissioners appointed for making Inquiries concerning Charities.

Before entering upon the immediate subject of this section, it may be proper to notice that the legislature has at various times, provided means for ascertaining the amount and application of the numerous charitable donations, which in some form have been given for the benefit of almost every parish in this kingdom.

By 26 Geo. III. c. 58, s. 4, the ministers, churchwardens, and overseers of every parish in England, were required to return on oath an account of all charitable donations which had been given by deed or will for the benefit of poor persons within their respective parishes; distinguishing as far as they were able, by whom, when, and in what manner, and for what purpose given; likewise whether such respective donations were in land or money, and in whom then

(*k*) *Parish of Market Raisen* v. *Brownlow*, 1 Ch. R. 49.

(*l*) Litt. s. 222; Co. Litt. 147, b; 1 Roll. Abr. 234. See Gilb. on Rents, 152.

(*m*) *East Greensted's* Case, Duke, 64 (638).

vested, and what was the annual produce thereof respectively (*n*).

The committee appointed by the House of Commons (*o*) to inspect and consider the returns made by the ministers and churchwardens, relative to charitable donations, for the benefit of poor persons, in pursuance of the act 26 Geo. III. c. 58, and to report from time to time their observations thereon to the house, and how far the directions of the said act had, or had not, been complied with, informed the house, that out of 13,000 parishes and townships in England and Wales (from which returns of charitable donations had been required), there were only fourteen that had made no such return.

The committee observed, that upon the face of the said returns, many of the said charitable donations appeared to have been lost; and that many others, from neglect of payment, and the inattention of those persons who ought to have superintended them, were in danger of being lost, or rendered

(*n*) The questions in the schedule to this act, to which answers were required to be returned, were,

1st. What charitable donations have been given by deed or will for the benefit of poor persons within your parish [or place]; by whom, when, in what manner, and for what particular purpose were they given, to the best of your knowledge, information, and belief?

2nd. Were the said respective donations in land or money; in whom are they now vested, and what is the annual produce thereof respectively, to the best of your knowledge, information, and belief?

By 55 Geo. III. c. 47, written answers were required to be returned by the overseers of every parish to the following (amongst other questions) relative to the maintenance of the poor and to the highways:—What is the average annual amount or produce of charitable donations (whether arising from land or money) which have been given by deed or will, for the benefit of poor persons within your parish, township, or place, and which are managed or distributed by the minister, churchwardens, and overseers, or any of them; distinguishing such donations as are applicable to the maintenance of parish schools? Is there any hospital, almshouse, school, or other permanent charitable foundation within your parish, township, or place, which is not under the management and control of the minister, churchwardens, and overseers, or any of them?

(*o*) 6 December, 1787, Commons' Journ. Vol. 43, p. 85.

very difficult to be recovered; and that the matter seemed to be of such magnitude, as to call for the serious and speedy attention of Parliament, to amend and explain the stat. 26 Geo. III. c. 58, by specifying with certainty and precision, the objects to which they might think fit to direct their inquiries, in order to procure full and satisfactory returns, and the establishment of such measures as might be effectual for the relief of the poor persons who were the objects of those donations, and for carrying the charitable and benevolent purposes of the donors into execution (*p*).

By stat. 52 Geo. III. c. 102, a memorial or statement of the real and personal estate, and of the annual income, investment, and objects of all charitable donations in England and Wales, then founded or thereafter to be founded, with the names of the founders or benefactors, and of the deeds or wills of endowment, and of the names of the trustees, is directed to be registered in the office of the clerk of the peace, who is to transmit a duplicate to the Enrolment Office of the Court of Chancery (*q*).

The misappropriation of charitable gifts must have long been a matter of notoriety, it was stated by high legal authority, that abuses existed in the management of charitable endowments. Thus Lord *Kenyon* said, "Whoever will examine the state of the grammar-schools in different parts of the kingdom, will see to what a lamentable condition most of them are reduced; and would wish, that

(*p*) Report of Committee of Commons, 1788.

An abstract of the returns of charitable donations made in pursuance of the stat. 26 Geo. III. c. 58, in the years 1786—1788, was ordered by the House of Commons, to be printed, 26th June, 1816, it appears that the amount of the charitable funds, comprised in the returns, was as follows, viz.—

Annual produce of money .	£	48,243	10 5
—— land . . .		210,467	8 10
Total.	£	258,710	19 3

(*q*) See the statute in the Appendix. Copies of memorials or statements of charitable donations delivered to the clerks of the peace in pursuance of stat. 52 Geo. III. c. 102, ordered by the House of Commons to be printed, 27th June, 1815; 25th May, 1829.

those who have any superintendance or control over them, had been as circumspect as the visitor in that case. If other persons had equally done their duty, we should not find, as is now the case, empty walls without scholars, and every thing neglected but the receipt of the salary and emoluments" (*r*).

And Lord *Eldon* said, "It is absolutely necessary that it should be perfectly understood that, charity estates all over the kingdom are dealt with in a manner most grossly improvident, amounting to the most direct breach of trust" (*s*).

In May, 1816, on the motion of Mr. now Lord *Brougham*, a select committee was appointed by the House of Commons to inquire into the education of the lower orders in the metropolis, and to report their observations thereupon, together with the minutes of evidence taken before them, from time to time to the house (*t*); that committee was revived in the following year (*u*).

A circular letter was addressed to all the clergy of *England*, *Wales*, and *Scotland*, requiring answers to queries, as to the endowments and other institutions for the education of youth, and the desire of the poor to have the means of education. The information received in answer to these letters was digested into tables, exhibiting at one view a general but minute chart of the state of education throughout the empire; so that the means then existing for public instruction in each district may be seen—how many children in any given place were taught, and after what manner—how many were clothed, or maintained—how the funds for their instruction or support arose—with much information of a miscellaneous nature, affording valuable suggestions for the farther and more strict investigation of all charitable abuses (*v*).

(*r*) *Rex* v. *Archbishop of York*, 6 T. R. 493.

(*s*) 13 Ves. 580.

(*t*) Hans. Parl. Deb. Vol. 34, p. 636.

(*u*) *Id.* Vol. 36, p. 823.

(*v*) See digest of parochial returns made to the select committee, appointed to inquire into the education of the poor; exhibiting a state of the school, and means of instruction in every parish in *England*. Ordered by the House of Commons to be printed, 1st April, 1819.

The committee on education incidentally observed, that charitable funds connected with education were not alone liable to great abuses, but that equal negligence and malversation appeared to have prevailed in other charities.

It was found that there existed throughout the country large funds, which had been bequeathed by individuals for all purposes of charity, and particularly for the education of the poor. These funds had, in many cases, been grossly misapplied; often, no doubt, from ignorance of the best method of employing them. In cases beyond the scope of the committee, it had come to their knowledge that schools richly endowed, in many parts of the country had fallen into disuse. For the purpose of investigating the abuses which had been discovered to exist, it was obvious that it was necessary to establish another tribunal, besides the committee of the House of Commons. The committee on education made several reports (*w*).

(*w*) The reports from the select committee on the education of the lower orders in the metropolis, ordered by the House of Commons to be printed, in June, 1816, and 7th July, 1817, relate to the following subjects:—

I. *General state of the education of the lower orders.* Deficiency of means of education; prevailing desire of education; children in the metropolis, their morals, education, and industry; conduct of their parents; state of religion, as influenced by education; dissenters' exertions for promoting education; Irish poor; education in Scotland.

II. *Institutions and charitable donations for promoting education.*—Charities and societies of various kinds connected with education; parochial Sunday and daily schools, and schools attached to corporations.

III. *Misapplication of funds.*—Investigation into the management of the funds of several endowments, particularly St. Bees, Pocklington, Lewisham, Spital, Mere, and Croydon charities.

IV. *System of general education.*—National establishment; parochial schools; associations of individuals; application of the holy scriptures, and national forms of prayers.

V. *Universities and great schools.*—Trinity and St. John's Colleges, Cambridge, and Eton College—their statutes; Westminster, Winchester, St. Paul's, and Christ's Hospital schools—their foundations; scholarships attached to particular places.

Report, 25th May and 5th June, 1818: parochial and other schools. Report, 3rd and 8th June 1818; subjects: British and Foreign School Society; Eton College; schools of St. Bees, Winchester, Highgate, Pocklington, Brentwood, Mere, Spital,

By stat. 58 Geo. III. c. 91, the king was enabled to issue a commission, under the great seal, to any number of persons, not exceeding fourteen (of whom eight only were to receive any remuneration, except travelling expenses), any three of whom were authorised and required "to examine into and investigate the amount, nature, and application of all estates and funds, of what nature or kind soever, and the produce thereof, destined or intended to be applied to the purpose of educating the poor in *England* and *Wales*, in so far as such produce should appear to be destined or applied for the purpose of educating the poor; and to examine into and investigate all breaches of trust, irregularities, frauds, abuses, or supposed abuses, or misconduct in relation to, and in the management, or appropriation, or non-appropriation, or misappropriation of such estates and funds; and to report their proceedings in writing, in each half year, to the king and to both houses of parliament, and to subjoin such suggestions as might seem expedient for securing such estates and funds against any future misapplication; and for the purpose of pro-

Yeovil, Huntingdon; education of the poor in Ireland; institution for the instruction of the poor at Hofwyl, near Berne, in Switzerland; Croydon and Wellingborough charities. Report, 5th June, 1818, contains statutes of Eton College. Report, 8th June, 1818, contains statutes of Trinity and St. John's Colleges, Cambridge.—An address was moved in the House of Commons, 24th May, 1833, for a return of the number of schools in each town, parish, chapelry, or extra-parochial place in *England* and *Wales*, after stating the amount of the population of the town or place, according to the last census, specifying, 1. Whether the said schools are infant daily or Sunday schools; 2. Whether they are confined, either nominally or virtually, to the use of children of the established church, or any other religious denomination; 3. Whether they are endowed or unendowed; 4. By what funds they are supported if unendowed, whether by payments from scholars or otherwise; 5. The numbers and sexes of the scholars in each school; 6. The age at which the children generally enter, and at which they generally quit school; 7. The salaries and other emoluments allowed to the masters and mistresses in each school, and also distinguishing; 8. Those schools which had been established or revived since 1818; 9. Those schools to which a lending library is attached. Abstracts of the answers and returns to the circulars, issued in pursuance of the above address, were ordered by the House of Commons to be printed, 1834, and 20th March, 1835.

moting such inquiries, any *three* of the commissioners were authorised to hold meetings at any place in *England*, and to require the attendance of all persons, acting as trustees of charity estates or funds, and to bring with them any deed or document relating thereto; provided that no person should be obliged to travel more than ten miles from his place of abode, nor to produce deeds which had reference to estates which the party might have purchased, without notice of any charitable trust, and without fraud or covin.

The powers of this act were expressly declared not to extend to either of the universities of *Oxford* or *Cambridge*, nor to any college or hall within the same; nor to any schools or other endowments of which universities, colleges, or halls are trustees; nor to the colleges of *Westminster*, *Eton*, or *Winchester*; nor to the *Charter House*; nor to the schools of *Harrow* or *Rugby*, or any of them; nor to any cathedral or collegiate church within *England*; nor to any college, free-school, or other charitable institution for the purposes of education, which had special visitors, governors, or overseers appointed by their founders; nor to any funds applicable to the purposes of education, for the benefit of any persons of the Jewish persuasion; nor to the people called Quakers; but the commissioners were directed to report the names of charities having special visitors (*x*).

The commissioners adopted the same rule of construction of the clause exempting charities which had special visitors, as had been applied to a similar one in the statute 43 Eliz. c. 4, s. 3, and held that the exception did not extend to such visitors, governors, and overseers as had the administration of any funds belonging to charitable institutions for the purposes of education. The commissioners acted upon that construction in their proceedings, and where they found charitable foundations provided with special visitors so circumstanced, they pursued their inquiries concerning such charities (*y*).

(*x*) The first commission, in pursuance of the above act, was appointed under the great seal 28th Aug. 1818.

(*y*) First Report of Commissioners, 4th March, 1819, p. 3. See *ante*, pp. 292—296.

The commissioners, conceiving the objects of investigation prescribed by the commission to be only such charities as were possessed of funds of a permanent nature, did not think it within their province to extend their inquiries to schools supported entirely by voluntary and casual contributions; where they met with schools maintained partly by such contributions, and partly by funds of a permanent nature, they pursued their examination so far as was necessary to ascertain the description, management, and application of the latter (*z*).

Under this act, the commissioners made their two first reports, with an appendix to each, containing the evidence on which the reports were founded; but the insertion of the evidence was subsequently abandoned, as tending to swell the bulk of the reports, and to protract the inquiry without corresponding advantage; the manuscript of the evidence remains at the office of the secretary of the commissioners.

The inconvenience arising from the restricted authority and limited number of the commissioners, rendered still greater by the regulation in the act, that *three* commissioners should constitute a board, called for various improvements. By 59 Geo. III. c. 81, the number of commissioners to be appointed was increased to twenty; any two of whom were empowered to act, but ten only were to be stipendiary. By the 5th section of this act, the powers of the commissioners were extended to gifts for the support of any charity or charities, for the benefit of poor people in *England* and *Wales*, or held under trusts for any charitable uses or trusts whatever in *England* or *Wales*, with the same exception of the universities and other schools, as in the former act, with the addition of the Corporation of *Trinity House, Deptford Strond*. It was also provided, that the act should not extend to any charitable institution or society, wholly or principally supported by voluntary contributions, nor to bequests in aid of them; but the application of rents of lands belonging to

(*z*) First Report of Commissioners, 4th March, 1819, p. 4.

such an institution for twenty years before the act passed, was subject to examination.

By stat. 59 Geo. III. c. 91, any five or more of the commissioners were authorised to certify to the Attorney General, such cases as appeared in their judgment to require legal interference, who was enabled to apply either by petition or information, or to commence a suit in the Court of Chancery, or Exchequer, for obtaining such relief as the nature of the case might require. Where the commissioners found a departure from the intention of the founder, which was of a grave or serious character, or any gross mismanagement of the property, or an application of the funds which amounted to any thing like embezzlement or a gross misapplication, they considered the case such as to induce them to report it to the Attorney General, in order that he might, if he thought fit, institute proceedings in the Court of Chancery, for the correction of the abuse. Some cases were certified by the commissioners, as requiring correction, in connexion with a new scheme, but more frequently on account of the misapplication of funds, the mismanagement of the property, or some dispute as to the validity of a claim which the charity might make upon the funds in the possession of other parties. Many cases were found to consist merely of a misapplication, arising from inattention or ignorance, of what was the original import of the founder's intention: these the commissioners in numerous instances were enabled to rectify by representing to the trustees and managers of the charities what their conduct ought to be; and on such representation, the evils were corrected by the trustees. It appears that proceedings were not taken in all the cases certified to the Attorney General, on account of the smallness of the sum to be recovered compared with the costs attendant on the necessary suit, and also by the consideration, that in the event of the proceedings being unsuccessful, there was no protection to the defendants, as no costs are ever paid by the crown (*a*).

(*a*) Six returns of the number of informations and petitions filed and preferred by the Attorney General at the instance of the charity

Under the stat. 59 Geo. III. c. 81, continued by 5 Geo. IV. c. 58, for four years, and thence until the end of the then next session of Parliament, and subsequently continued by 10 Geo. IV. c. 57, until the 1st July, 1830, the commissioners made twenty-two further reports, making altogether twenty-four reports. As a guide to those who may have occasion to refer to the reports, it is proper to state, that there have been printed by the order of the House of Commons (*b*), a General Index to the first fourteen reports, and an Analytical Digest (*c*) of the reports to the termination of the commission in 1830; in which are given the quantity of land and number of houses, with the nature of the tenure, when less than an estate of inheritance—the rent paid for such land and houses respectively—the amount of money, stating the sums in the funds upon mortgage and personal security, and whether advanced with or without interest—the number and amount of unimprovable rent and other charges—the number and kind of ecclesiastical promotions—and the number of scholarships—and whether the latter are made available—and the number and situation of the endowed schools in each county. There has also been printed a list of counties reported upon, and not reported upon; with the number of charities investigated, and the income of each charity in each county respectively (*d*).

After an interval of fifteen months from the 1st of July, 1830, to the 15th October, 1831, the inquiry was again revived by stat. 1 & 2 Will. IV. c. 34; under which, commissioners were appointed to continue the inquiry concerning charities in *England* and *Wales* for two years, and from thence to the end of the then next session of Parliament,

commissioners, have been printed by the order of the House of Commons, 1st May, 1828; 22nd May, 1829; 13th July, 1830; 29th August, 1831; 8th May, 1833; 9th Sept. 1835.

(*b*) 6th March, 1828.

(*c*) 20th January, 1832. See *post*, p. 310.

(*d*) This last return was printed by an order of the House of Commons, 3rd June, 1828; and a subjoined report states, that the sum total of the annual income of all the charities investigated at that period, amounts to between £480,000 and £500,000.

which event happened in the 15th August, 1834, when the commission was at an end.

The stat 1 & 2 Will. IV. c. 34, extended in several material respects the objects of the inquiry. The provisions in the former acts which restricted the power of the commissioners to charities, not having special visitors, governors, or overseers appointed by the founders, were omitted; but the Royal Hospitals of Christ, Bridewell, St. Thomas the Apostle, and St. Bartholomew and Bethlem, were for the first time added to the list of excepted endowments (*e*). Two commissioners were to constitute a board, and they were empowered to pursue their examination separately whenever in their judgment they might deem it expedient so to do; and further, any five commissioners might direct any one commissioner to sit at *Westminster*, or to resort alone to any other place for the purpose of examining into any charity. This latter power, however, has never been exercised; and in those cases, where two commissioners deemed it expedient to act separately, the efficiency of such an arrangement was impaired, on account of there being only one clerk for their assistance.

Under the statute 1 & 2 Will. IV. c. 34, the commissioners have made six reports, which have been printed by the order of the House of Commons (*f*). An analytical digest of these reports in continuation of that already mentioned (*g*),

(*e*) *Ante*, p. 306.

(*f*) 25th Report, 11th March, 1833; 26th Report, 16th August, 1833; 27th Report, 21st April, 1834; 28th Report, 13th August, 1834; 29th Report, 20th May, 1835.

(*g*) *Ante*, p. 309.

The analysis sets forth the name of the parish, township, or chapelry—the name of the donor of the charity—the object of it—the quantity of land or description of real property, the rental—the amount of rent charges, or unimprovable rents with deduction for land tax—the amount of capital of personal property, and in what security it is invested, and the annual produce—likewise the total income of each charity, and such observations as occurred to explain the preceding columns, or to point out what the effect of the inquiry has been, as appears by the reports. The total annual income of the charities included in the digests printed in 1832 and 1835, is £748,178. 5*s*.

was printed in 1835, including all the charities which have been reported, except those in the counties of *Dorset* and *Essex*.

The commissioners, previously to going to any place, endeavoured to ascertain the number of charities to be investigated within the district of ten miles; and issued precepts for the attendance of persons most competent to give the information required—as the churchwardens of parishes and the trustees of charities. An advertisement was previously inserted in the county papers, stating that the commissioners would be at certain places on or about the days therein named, and inviting all persons to give information.

The objects to which the commissioners of charities directed their attention, were—the nature of the foundation; the particulars and management of the property which was the subject of the endowment; and the mode in which the income derived from the property had been applied.

Having taken the abstract of the original deed or will creating the charity, the first point was to trace the legal estate into the then existing trustees, which completed one part of the inquiry. Then they examined into the property, the tenants, the rents at which the property was let, taking into consideration the proportions between the several rents at which the property was let and the number of acres, and also examined the leases of the property and the application of the revenue.

The inquiry by the commissioners does not appear to have been systematically pursued; portions of, and even separate towns in the same county, having been examined at distant intervals of time(*h*). The tendency of this disjointed course of inquiry has been to delay redress, and to render access to the reports difficult and expensive. At the same time it is only just to observe, that such a course of proceeding was occa-

(*h*) Parts of the inquiry at *Bristol* are to be found in vols. 6, 7, 8, 9, 10, and 12; of *Bolton*, in vols. 3, 4, and 13; the county of *Bedford*, in vols. 5, 6, 8, 10, 12; *Essex*, which is still incomplete, in vols. 2, 4, 6, 8, 10, 11; and the reports relating to *Yorkshire* are dispersed over upwards of twenty volumes.

sioned, in a great degree, by the obligation imposed upon the commissioners to report to the secretary of state twice each year, and by their attention having been very frequently called to cases of emergency. It is to be hoped that the commissioners, in the future prosecution of their labours, may obviate these inconveniences by pursuing the inquiry uninterruptedly in each county and place, from its commencement to its completion; and, so far as it may be practicable, by bringing the reports of each county into the same volume.

Six counties in *England* and the same number in *Wales*, remain altogether uninvestigated by the commissioners (i).

The salary awarded by the treasury to each commissioner, at the commencement of the inquiry, was 1000*l.* a-year, which continued until 1832, when it was reduced to 800*l.* The commissioners were enabled to appoint one secretary, five clerks, five messengers, and two other officers, as they should think fit; and the lords commissioners of the treasury were authorised to pay any sum of money, not exceeding 4000*l.* for the travelling expenses of the commissioners and the salaries of their officers, and other incidental expenses. Thus authorised, the commissioners appointed a secretary, at the salary of 500*l.*; five clerks, at a salary of 300*l.* a-year each, (since reduced to 250*l.* each); and one permanent messenger.

The total cost attending the commission, from its com-

(i) The total number of charities investigated by the commissioners in *England*, is 26,751; and in *Wales*, 890. The number of English counties which may be, for the present, considered as complete, is 28, viz. *Bedford, Buckingham, Cumberland, Derby, Devon, Durham, Gloucester, Hertford, Huntingdon, Lancaster, Monmouth, Norfolk, Northampton, Northumberland, Nottingham, Oxford, Rutland, Salop, Somerset, Southampton, Stafford, Suffolk, Surrey, Warwick, Westmoreland, Wilts, Worcester*, and *York*. Six English counties have been partially investigated, viz. *Berks, Dorset, Essex, Kent, Middlesex, Sussex;* and the remaining counties, viz. *Cambridge, Chester, Cornwall, Hereford. Leicester*, and *Lincoln*, are entirely uninvestigated. Of the Welsh counties, *Anglesea, Cardigan, Carmarthen, Carnarvon, Merioneth*, and *Pembroke* have been completed; but the counties of *Brecon, Denbigh, Flint, Glamorgan, Montgomery*, and *Radnor* remain altogether unexamined.

mencement to its close, appears, by a return made to the House of Commons, on the 6th May, 1835, to be 208,627*l.* 13*s.*, besides some arrear of salaries to commissioners, and other expenses not then liquidated; and exclusive of an advance of 10,000*l.* for law charges, the greater part of which sum will probably be repaid, as the proceedings in chancery, still pending, shall terminate. In addition to this, the sum of 20,000*l.* may be calculated as the probable charge of printing the reports up to July, 1835.

It can scarcely be considered unreasonable to have anticipated that some report, of a general nature, embodying the observations and suggestions of the commissioners on the abuses of charities which most require correction, should have been made by them. Few general results, however, are stated; but observations upon the particular charities investigated by them are subjoined. In the third report (*j*), it is stated that the irregularity which frequently occurs in filling up the places of deceased trustees, is productive of great inconvenience—the management of charitable funds being, in many instances, by this omission, thrown into the hands of persons who are invested with no legal authority. In the case of small charities, the formal appointment of new trustees, by regular instruments, is often prevented, by the want of funds to defray the expenses; it seems, therefore, highly desirable that some easier and less expensive mode should be devised of perpetuating such trusts.

Much mischief has been found to result from the practice of placing money, destined to charitable uses, upon private security; and still more from leaving it in private hands, at interest, without any security. By referring to the commissioners' reports, numerous instances will be seen of charitable funds lost by these means; and it seems desirable that some power should exist, under due modifications, of enforcing the investment of such funds on proper security.

Some good consequences are likely to follow from the investigation of charities by the commissioners. In the first

(*j*) 1st May, 1820, p. 4.

place, it has led to a more accurate knowledge of the nature and extent of the charitable funds existing in the districts where the inquiries have been made. The publicity given to the mismanagement and abuse of charities is, at least, a great step towards their correction. Where neglect or breach of trust has been committed, the mere report and publication of the existing abuses has probably had considerable influence in leading the parties concerned to correct them; and even the apprehension of an approaching inquiry has, no doubt, in many cases, produced a similar effect. Where the misapplication arose from error of judgment or an injudicious principle, the suggestions of the commissioners may have produced an improved system of management.

Several charities are noticed in the report of the corporation commissioners, although they did not inquire into the particular state of public charities and eleemosynary foundations in the corporate towns of which the corporators were, in whole or part, administrators—except so far as respected any misuse for corporate and municipal purposes, or in cases where the administration of the said estates appeared to have been mixed up with that of the proper funds of the corporation (*k*).

By stat. 5 and 6 Will. IV. c. 71, (which is to continue in force until 1st March, 1837), the king is enabled to a commission (*l*) to not fewer than *thirty* commissioners, (one

(*k*) First Report of the Commissioners appointed to inquire into the Municipal Corporations in *England* and *Wales*, ordered by the House of Commons to be printed, 30th March, 1835, p. 16. A return of the charitable funds, and other property, in the possession, order, or disposition of each municipal corporation in *England* and *Wales*; the manner in which the same had been acquired, and the purposes for which the same were given; and the mode in which they now are distributed and applied, were ordered by the House of Commons to be printed, 4th July, 1834.

(*l*) This act will be found in the Appendix.

A commission was issued under this act, 22nd October, 1835, to thirty-one commissioners, of whom Lord *Brougham* is to be the chief commissioner, to superintend and direct the mode of proceeding of the other commissioners, acting in the execution of the same act.

of whom is to be called the chief commissioner, to direct the proceedings of the other commissioners), who are empowered to examine the amount, nature, and application of all estates and funds intended to be applied to the purpose of educating the poor, or to the support of any charities in *England* or *Wales;* and to investigate all breaches of trust and misapplication of such estates and funds; and to report half-yearly their proceedings, touching the amount, nature, management, application, and appropriation of such of the estates and funds as shall have been examined into; also, what is the nature of such estates and funds respectively, and the actual annual produce thereof, and in whose possession, as tenants thereof, any part thereof, consisting of lands, tenements, or hereditaments, shall be; adding, at the same time, such observations as shall occur to them respecting such mode as they shall deem most effectual for the recovering of such part or parts of such estates and funds as shall appear to them to have been applied in breach of the several trusts, created in respect of the same, or shall appear to have been omitted to be applied, in pursuance of such trusts; and subjoining such suggestions as may seem to them expedient, respecting the most effectual mode of securing such estates and funds and their respective produce, against any future misapplication thereof.

Power is given to the commissioners to report special circumstances, where the funds cannot be applied to the destined purposes. No remuneration is to be allowed to more than twenty of the commissioners. The commissioners are authorised to employ one secretary, twenty clerks, one messenger, and two other officers. Any one or more of the commissioners are to hold their sittings in *Westminster*, or any other place in *England* or *Wales;* and are authorised to require, by precepts under hand and seal, the trustees of any charity or other persons having the management of any charity, to render an account of the funds, and to require the production of any deeds and writings, relating to any estates, which the commissioners shall think necessary; but no person is obliged to travel more than ten miles from his residence. The com-

missioners are empowered to examine parties upon oath. Purchasers for valuable consideration, without notice, are not bound to answer interrogatories, nor to produce deeds.

The act does not extend to the Universities of *Oxford* or *Cambridge*, nor to any college or hall within them, nor to any schools of which they are trustees, nor to the colleges of *Westminster*, *Eton*, or *Winchester*, nor to the *Charterhouse*, nor *Harrow*, *Rugby*, nor the corporation of *Trinity House*, nor to any cathedral, nor to funds applicable to the benefit of Jews, Quakers, or Roman Catholics, (under the control of persons of those persuasions), nor to charities chiefly supported by voluntary contributions, except as to the management and application of the rents of lands belonging to any such institution, for twenty years or upwards before the passing of the act.

The chief commissioner is directed to superintend all proceedings instituted by the attorney general, in pursuance of the 59th Geo. III. c. 91, with a view to their prompt termination.

By stat. 2 Will. IV. c. 57, s. 4, whenever it should appear to the commissioners, appointed by stat. 1 and 2 Will. IV. c. 34, that the property of any charity consisted of one or more annuities or rent-charges, not exceeding the yearly sum of 20*l.*, and there were no existing trustees or persons qualified to receive and give a discharge for the same, power was given to any five of the commissioners, by writing, under their hands and seals, to empower the resident minister and the churchwardens, for the time being, of the parish interested in such charity, to receive the same rent-charges and the arrears thereof, and to apply the same to the purposes of the charitable donations until trustees of the charity, duly appointed, should claim the administration of the funds, or until trustees should be appointed by the Court of Chancery or Exchequer —the receipts of the minister and churchwardens to be effectual discharges—who, during the continuance of the power to be given to them, were authorised to use all powers and remedies for recovering such rent-charges. By stat. 5 and 6 Will. IV. c. 71, s. 20, the power given by the above act to the com-

missioners is extended to rent-charges, not exceeding in the whole the yearly sum of 50*l.*

The committee appointed during the last session of Parliament, were inclined to recommend (*m*) that the superintendence, and, in certain cases, the administration of all property devoted to charitable uses, should be entrusted to a permanent board of three commissioners, or some other independent authority, on whom should be imposed the duty of superintendence and control over the administration of all property devoted to charitable uses; that such board should have authority to call for, from time to time, and to enforce a return or an account of the annual funds and property of any charitable institution; and have power to summon before themselves, or other persons specially authorised by them, all parties concerned in the management or administration of any charitable institutions or funds—in case of necessity to appoint, and upon adequate cause clearly established, to remove trustees—to take care that no sale, mortgage, or exchange of charity property be effected without their concurrence; and that all funds applicable to charitable purposes be invested upon real or government security—to superintend their application—to suggest and (if necessary) to enforce arrangements for the preservation of all documents and other writings relating to charity estates—to give acquittances in discharge of all payments in cases where no competent party can be found to give the same—to audit from time to time the annual accounts of trustees and other persons administering charity property—to have the power of removing masters and ushers, and to sanction the salaries to be paid to them, as also such allowances upon their retirement, as the circumstances may require and the funds will admit—such power to be exercised, and such sanction given concurrently with the visitors where any such exist—and generally to authorise such arrangements as shall appear calculated to promote the object of the founder; and in cases in which that object is useless or unattainable, to sug-

(*m*) See report from select committee on charities, 30th July, 1835, pp. 8, 9.

gest such other appropriation as may appear desirable. The board to be empowered to suggest schemes for the government of all charities, and for the management of all estates and funds belonging to such charities, and to correct any abuses therein, subject to the like concurrence in cases where there are special visitors; and in cases where parties are willing, the board to be empowered by themselves, or others duly authorised by them, to adjudicate and finally determine all disputes respecting conflicting claims and accounts. Trustees to be indemnified for the acts which they may perform under the direction of the board. In order to avoid the expense and delay inseparable from the present mode of administering legal remedies, as also to encourage summary arrangements, and for facilitating proceedings in cases where such are indispensable; it was recommended by the committee, that no proceedings in equity be instituted until the case has been investigated by such board, who shall if necessary certify to the Attorney General, or Solicitor General, that the case appears to them such as to require legal investigation (*n*).

(*n*) Report of Committee in Charities, ordered by the House of Commons to be printed, 30th July, 1835, pp. 8, 9.

Some suggestions for the establishment of a court for the management of charities, will be found in the report on the Court of Chancery, 9th March, 1826, p. 583.

A bill was brought in by Lord *Brougham* in the last session of Parliament, 3rd July, 1835, which his lordship has intimated will be renewed early in the next session, for promoting education and regulating charities.

By this bill it is proposed to constitute the lord president of the council, the lord privy seal, and the secretary of state for the home department, for the time being, and in his absence, the senior under secretary of state, with the speaker of the House of Commons; and any three persons being serjeants-at-law or barristers-at-law, of not less than seven years' standing, to be appointed by the king's sign manual to be commissioners, for carrying the powers of the act into execution, with a power to choose a secretary and two clerks. It is proposed to give such commissioners the following powers.—A power to receive applications for aid in establishing infant and other schools, and schools for training teachers, and to apply funds granted by parliament or vested in the commissioners by individuals for those purposes—a power

In cases where the parties, notwithstanding such suggestions, insist upon proceedings at law or in equity, the board of commissioners shall be directed to certify the special circumstances to the court. And it was recommended, that the court may, in such and all other charity cases, be empowered to refer the investigation of the facts and circumstances to such board, who shall report thereon to the court. It was also suggested with the view of securing permanently the full benefits of the charity commission inquiry, and a constant and uniform superintendence over the administration of all charitable institutions, that such board should be authorised in cases where it may appear necessary, to call for returns

on the application of the minister and churchwardens of a parish, or the attorney general, or the heir of the founder, or a special visitor, to fill up the number of trustees after certain notices to be given; the trustees so appointed are to have all the powers of the original trustees—a power to consider applications from the trustees of every charity for leave to mortgage, sell, or exchange, or grant leases of estates belonging to any charity, and with the consent of the visitor (if any), to make orders for any of those purposes—a power to communicate to the trustees and special visitors (if any), of funds given for the support of any grammar or other school, or hospital, for the support of children, the opinion of the commissioners concerning the most beneficial application of the funds, and to make an order accordingly—a power where such trustees or visitors shall decline to exercise such powers as the commissioners are authorised to give, for them to petition the judicial committee of the privy council, which is to hear the matter, and to give directions, and to appoint new trustees—a power to authorise the trustees of any school to make conditions with the master as to not taking boarders or otherwise; and on breach of such conditions, to remove the master.

The bill contains a provision for giving to such board the powers of the statute 1 & 2 Will. IV. c. 34, (*ante*, p. 310), in calling for accounts and requiring information as to the management of charities from the trustees—a power where the commissioners are informed by petition of any abuse in the administration of any charity, and they shall not think proper to direct an information to be filed to determine the matter, after one month's notice to the party complained of, who is to have a power of appealing to the judicial committee of the privy council: where a complaint shall be made against a mayor or town council, either the individuals complained of, or the town clerk, or other person in whose name, such

similar to those required by stat. 26 Geo. III. c. 58 (*p*), adding the names of the present trustees with whom the title-deeds of any charity are deposited, and how the income is applied (*q*).

The committee desired to invite attention to the case of *Berkhampstead* Grammar School (*r*), as, apart from its own peculiar circumstances, it serves to illustrate the nature of the defects which pervade, in very many instances, similar institutions throughout the country; where, even though superintended by a special visitor, and administered under the Court of Equity, the master of the school is practically beyond any existing control; and the funds of the endowment are wasted by the costs and delay inseparable from legal proceedings.

magistrates and town council sue and are sued, are to be cited before the commissioners.

A power enabling the commissioners to sue and to be sued in the name of their secretary.

(*p*) *Ante*, pp. 300, 301.

(*q*) With respect to charities connected with education, the committee suggested that it would be desirable to ascertain among other objects, when, and by whom, the school was founded—the original endowment and present amount of it—whether any subsequent endowments have been made, and by whom, and to what amount—whether these endowments are in land or otherwise, and where situate—whether there are any existing statutes and ordinances—whether the school is open to the children of the town or parish indefinitely, free of expense, or for a certain number of scholars only, or by place of nativity, or otherwise—the number of boys admitted upon the foundation, and how many others are usually educated in the school—at what age the boys are admitted, and how long they remain without superannuation—the form of admission, and who are the persons that nominate—the routine of education prescribed—the number of exhibitions, scholarships, or other University advantages, and the amount of each—to what colleges boys are usually sent, and the number enjoying such special advantage at each school—the master's name, and the number of ushers employed by him, and the salary and emoluments of each respectively—whether the head master takes pupils, and what is the annual charge for the board and education of each boy?—*Report of Committee on Charities*, 30th July, 1835, pp. 9, 10.

(*r*) An account of the proceedings in this case is given in the report of the committee, pp. 10, 15, 32; and the 25th report of the charity commissioners, p. 289.

In this case it was found, that a valuable institution with large funds and appropriate premises, adequate to the free education of a great number of children, and the liberal maintenance of the necessary instructors, with a surplus fund, which, rightly administered according to the design of the benevolent founder, would afford comfortable provision to many deserving objects, in all material circumstances the reverse of what it ought to be. The committee found a master and usher—the latter the son of the master, and appointed by him when a minor—the incorporated trustees of the charity property, receiving to their own use considerable stipends; the school-house dilapidated—no boys on the foundation; and the surplus revenue so exhausted by law and other expenses, as to leave an uncertain trifle for the relief of the poor (*s*).

By statute 1 and 2 Will. IV. c. 60, s. 39, it is enacted "that in any parish adopting that act, the vestry shall cause to be made out, once at least in every year, a list of the several freehold, copyhold, and leasehold estates, and of all charitable foundations and bequests (if any) belonging to the said parish, and under the control of the said vestry; the said list to contain a true and detailed account of the place where such estate or charitable foundation may be situate, or in what mode and security such bequest may be invested; specifying also the yearly rental of each, and the particular appropriation thereof; together with the names of the persons partaking of their benefit (except where such benefit shall be allotted to the poor of the parish generally) and to what amount in each case; and also stating the name and description of the persons in whom such estates are vested, and the names and description of the trustees of each charity: provided always, that the aforesaid list shall be open for the inspection of the rate-payers, at the office of the vestry-clerk, at the same time with the accounts, when audited, according to the provisions of that act."

By statute 4 & 5 Will. IV. c. 76, for the amendment and better administration of the laws relating to the poor in *England*

(*s*) Report of select committee on charities, ordered by the House of Commons to be printed, 30th July, 1835, p. 15.

and *Wales*, the king is authorised to appoint three commissioners, to be styled the Poor-Law Commissioners of *England* and *Wales*. By the 85th section of that act it is enacted, "that it shall be lawful for the said commissioners, and they are thereby empowered, from time to time as they may think fit, to require from all persons in whom any freehold, copyhold, or leasehold estate, or any other property or funds belonging to any parish, and held in trust for or applicable to the relief of the poor, or which may be applied in diminution of the poor-rate of such parish, shall be vested, or who shall be in the receipt of the rents, profits, or income of any such estate, property, or funds, a true and detailed account in writing of the place where such estate may be situate, or in what mode, or on what security such other property or funds may be invested, with such details of the rents, profits, and income thereof, and of the appropriation of the same, and of all such other particulars relating thereto, as the said commissioners may direct and require; and such statement or a true copy thereof shall, under the regulations of the said commissioners, be open for the inspection of the owners of property and rate-payers in such parish: provided always, that nothing thereinbefore contained shall apply to any funds raised from time to time by the voluntary contributions of the inhabitants of any parish."

SECTION IV.

Of the Visitation of Charities.

1. *Of the Nature and Origin of Visitatorial Power.*
2. *Of Visitation in right of the Crown*, p. 332.
3. *Of the appointment of Special Visitors*, p. 343.
4. *Of the Powers of Visitors*, p. 360.
5. *Of Interference by Mandamus, in Cases of Eleemosynary foundations*, p. 380.

1. *Of the nature and origin of visitatorial power.*] A general view of the different kinds of corporations has been taken

in a preceding part of this work (*t*). Civil corporations are subject to the jurisdiction of the Court of King's Bench; spiritual corporations are visited in ecclesiastical matters by the ordinary; and eleemosynary corporations, founded by the king, are subject to the visitation of the king and his successors, and when founded by a private individual, to the visitation of the founder or his heirs, or the person specially appointed by the founder; for the ordinary has no power of visitation over lay corporations.

The founder of all corporations (in the strictest and original sense) is the king alone, for he only can incorporate a society; and in civil incorporations, such as mayor and commonalty, &c., where there are no possessions or endowments given to the body, there is no other founder but the king (*u*); but in eleemosynary foundations, such as colleges and hospitals, where there is an endowment of lands, the law distinguishes and makes two species of foundation—the one, *fundatio*

(*t*) *Ante*, pp. 21, 26.

(*u*) By stat. 5 & 6 Will. IV. c. 76, s. 1 (for the regulation of municipal corporations in *England* and *Wales*), so much of all laws, statutes, and usages, and so much of all royal and other charters, grants, and letters patent then in force relating to the several boroughs named in the schedules (A) and (B) to that act annexed, or to the inhabitants thereof, or to the several bodies or reputed bodies corporate named in the said schedules, or any of them, as are inconsistent with, or contrary to, the provisions of that act, are thereby repealed.

By the 141st section of the same act, after reciting that sundry towns and boroughs of *England* and *Wales* are not towns corporate, and that it is expedient that several of them should be incorporated, enacts, "that if the inhabitant householders of any town or borough in *England* and *Wales*, shall petition his majesty to grant to them a charter of incorporation, it shall be lawful for his majesty, by any such charter, if he shall think fit, by advice of his privy council, to grant the same, to extend to the inhabitants of any such town or borough within the district, to be set forth in such charter the powers and provisions in that act contained: provided nevertheless, that notice of every such petition, and of the time when it shall please his majesty to order that the same be taken into consideration by his privy council, shall be published, by royal proclamation, in the *London Gazette*, one month at least before such petition shall be so considered."

incipiens, or the incorporation, in which sense the king is the general founder of all colleges and hospitals; the other *fundatio perficiens*, or the dotation of it, in which sense the first gift of the revenues is the foundation, and he who gives them is in law the founder; and it is in this last sense that we generally call a man a founder of a college or hospital (*v*). But here the king has his prerogative—for if the king and a private man join in endowing an eleemosynary foundation, the king alone shall be the founder of it (*w*); and, in general, the king, being the sole founder of all civil corporations, and the endower the perficient founder of all eleemosynary ones, the right of visitation of the former results, according to the rule laid down, to the king, and of the latter to the patron or endower (*x*).

If a common person founded an abbey or priory, with possessions of small value, and afterwards the king endowed it with large possessions, yet such person was the founder (*y*).

The king, being thus constituted by the law visitor of all civil corporations, the law has also appointed the place wherein he shall exercise this jurisdiction, which is the Court of King's Bench; where, and where only, all misbehaviours of this kind of corporations are inquired into and redressed, and their controversies decided. In general, corporate bodies, which respect the public police of the country and the administration of justice, are better regulated, under the superintendence of that court, than the Court of Chancery (*z*); and this is what is understood to be the meaning of lawyers, when they say that these civil corporations are liable to no visitation—that is, the law, having by immemorial usage appointed them to be visited and inspected by the king, their founder, in his Majesty's Court of King's Bench, according to the rules of the common law, they ought not to be visited elsewhere, or by any other authority; and this is so strictly true,

(*v*) 10 Rep. 33, 2 T. R. 352.
(*w*) 2 Inst. 68.
(*x*) 1 Bl. Comm. 480, 481.
(*y*) 2 Inst. 68. See Magna Charta, 9 Henry III., c. 33.
(*z*) 4 T. R. 233.

that though the king, by his letters patent, had subjected the college of physicians to the visitation of four very respectable persons—the lord chancellor, the two chief justices, and the chief baron; though the college had accepted this charter with all possible marks of acquiescence, and had acted under it for near a century, yet, in 1753, the authority of this provision coming in dispute, on an appeal preferred to these supposed visitors, they directed the legality of their own appointment to be argued; and, as this college was merely a civil, and not an eleemosynary foundation, they at length determined, upon several days' solemn debate, that they had no jurisdiction as visitors, and remitted the appellant (if aggrieved) to his regular remedy in his Majesty's Court of King's Bench (*a*).

By the common law, all spiritual persons and corporations—as parsons, vicars, deans, prebendaries, deans, and chapters—are subject to the visitation of the ordinary; as were formerly *spiritual* hospitals, abbies, and priories (*b*); but royal foundations, free chapels, and donatives are exempt from the

(*a*) 1 Bl. Comm. 481.

King's College, *London*, is incorporated by letters patent, dated 14th August, 1829, by the name of "*The Governors and Proprietors of King's College, London*;" who are enabled, by that name, to take, purchase, and hold, to them and their successors, any goods, chattels, or personal property whatsoever; and, notwithstanding the statutes of mortmain, to take, purchase, and hold, to them and their successors, not only all such lands, buildings, hereditaments, and possessions as may be, from time to time, exclusively used and occupied for the immediate purposes of the said college, but also any other lands, buildings, hereditaments, and possessions whatsoever, situate within the United Kingdom of *Great Britain* and *Ireland*, not exceeding the annual value of 5000*l.*, such annual value to be calculated and ascertained at the period of taking, purchasing, or acquiring the same; with power to grant, demise, alien, or otherwise dispose of, all or any of the property, real or personal, belonging to the said college; and to do all other matters incidental or appertaining to a body corporate. The Archbishop of *Canterbury* (for the time being) is appointed by the charter visitor of the said college, with authority to do all those things which pertain to visitors, as often as to him shall seem meet.

(*b*) 2 Roll. Abr. 229, 230, 231; 10 Rep. 31; 12 Mod. 12.

visitation of the ordinary, and subject to that of the patron only, whether that patron be the king or a subject (*c*); and the king visits either by his chancellor, or by commissioners, or in person (*d*).

By stat. 1 & 2 Geo. II. c. 10, s. 14, 15, all such donatives as have been augmented by the governors of Queen Anne's bounty, as at the time of their augmentation, were exempt from all ecclesiastical jurisdiction, shall, by such augmentation, become subject to the visitation and jurisdiction of the bishop of the diocese where such donative is; but no donative is to be augmented without the consent of the patron in writing, under his hand and seal.

There were likewise some abbies and priories, and *spiritual* hospitals, and some chapels and churches belonging to abbies and priories, which were specially exempted from the visitation of the ordinary, and subject only to that of the pope; and when the jurisdiction of the pope was abolished by stat. 25 Henry VIII., c. 21, the exemption was continued by the 20th section of that act, and the visitation ordered to be by commission from the king, under the great seal; but by stat. 31 Henry VIII., c. 13, s. 23, all churches and chapels belonging to the monasteries and other religious houses, dissolved by that statute, which were exempted from the visitation of the ordinary, were subjected to the visitation of the ordinary of the diocese, or to that of such person or persons as the king should appoint.

The ordinary may in his general visitation, by virtue of his visitatorial power, deprive a canon or prebendary for incontinency or other offences described in the statutes; and this of his own authority, without observing all the preliminary forms appointed by the statutes (*e*). But a bishop, as visitor of the dean and chapter, seems to have no jurisdiction to determine between the members on the subject of their corporate property, at least where the representatives of

(*c*) Co. Litt. 344 a. Fortescq. 329; 1 Mod. 84; *Anon.* 12 Mod. 233; *Fairchild* v. *Gayre*, Cro. Jac. 63; *S. C.* Yelv. 60.

(*d*) Co. Litt. 96 a., 344 a.; 2 Roll. Abr. 230.

(*e*) *Rex* v. *Bishop of Chester*, 1 Wils. 206; 1 W. Bl. 22.

deceased prebendaries are concerned (*f*). It is clear that he cannot, by virtue of such power, fill up a vacancy in the stalls of the cathedral by lapse (*g*). And whether he can, as visitor, decide in matters of election to such stalls, is a question which has not yet received an entire solution (*h*). And where the powers of a visitor of a spiritual corporation are suspended, or no visitor expressly appointed, the Court of King's Bench has jurisdiction (*i*).

Where an archbishop has a right to visit a dean and chapter, the manner of his visitation is not so material as to lay a ground for a prohibition, because any error or defect in the manner of the visitation may be remedied by appeal (*k*).

Although a benefice is appropriated to a prior, or a dean and chapter, yet the bishop may visit, to see how the church is served, &c., and for contumacy may proceed to suspend the incumbent from his office and benefice (*l*).

By stat. 2 Henry V. c. 1, s. 1, it was enacted, that hospitals of the king's foundation should be visited by the ordinaries, by virtue of the king's commission directed to them, and that other hospitals should be visited by the ordinaries, who should inquire of the foundation and government of the same and of all other necessary matters, and thereupon make correction and reformation according to the law of holy church as to them belonged (*m*).

(*f*) *Rex* v. *Bishop of Durham*, 1 Burr. 567; *S. C.* 2 Ken. 296.

(*g*) *Bishop of Chichester* v. *Harward*, 1 T. R. 650.

(*h*) *Ibid.* 1 Wooddes. 474, 475.

(*i*) *Rex* v. *Bishop of Chester*, 2 Str. 797.

(*k*) *Bishop of Kildare* v. *Archbishop of Dublin*, 2 Br. P. C. 179, 2nd ed.

(*l*) *Harrison* v. *Archbishop of Dublin*, 2 Br. P. C. 199, 2nd ed.

(*m*) 2 Henry V. stat. 1. c. 1, "First, forasmuch as many hospitals within the realm of England (founded as well by the noble kings of the said realm, and lords and ladies spiritual and temporal, as by others of divers estates, to the honour of God and of his glorious mother, in aid and merit of the souls of the said founders, to the which hospitals the said founders have given largely of their moveable goods for the buildings of the same, and largely of their lands and tenements, therewith to sustain old men and women, lazers, men and women out of their wits, poor women with child, and other poor persons, to nourish, relieve, and refresh them there) be now for the most part decayed, and

By stat. 14 Eliz. c. 5, the bishops of the diocese are directed to visit hospitals of which no visitor is appointed by the founders.

By stat. 39 Eliz. c. 3 (*n*), which authorises the incorporation of hospitals by deed enrolled (*o*) it is enacted, "that they shall be governed and visited by such person or persons, bodies politic or corporate, their heirs, successors, or assigns, as shall be nominated or assigned by the founder or founders, their heirs or assigns, according to such rules, statutes, and ordinances as shall be established by the founder or founders, his or their heirs or assigns, in writing under his or their hand and seal, not being contrary to the laws and statutes of the realm."

The power to issue commissions of charitable uses, to inquire into the misapplication of charitable funds, under the stat. 43 Eliz. c. 4, did not extend to hospitals which have special visitors or governors, nor abridge the power of the ordinary (*p*).

the goods and profits of the same, by divers persons, spiritual and temporal, withdrawn and spent to the use of others, whereby many men and women have died in great misery for default of aid, livelihood and succour, to the displeasure of God, and peril of the souls of such evil dispensers: the king our sovereign lord, considering the meritorious and devout intents of the founders aforesaid, and also the evil and unaccustomed government therein had, by the advice and assent aforesaid, hath ordained and established, that as to the hospitals which be of the patronage and foundation of the king, the ordinaries, by virtue of the king's commissions to them directed, shall inquire of the manner of the foundation of the said hospitals, and of the governance and estate of the same, and of all other matters necessary and requisite in this behalf; and the inquisitions thereof taken shall certify into the King's Chancery. And as to other hospitals which be of the foundation and patronage of other than of the king, the ordinaries shall inquire of the manner of the foundation, estate, and governance of the same, and of all other matters and things necessary in this behalf; and thereupon shall make thereof correction and reformation according to the laws of the holy church, as to them belongeth."

(*n*) Made perpetual by stat. 21 Jac. I. c. 1.

(*o*) See *ante*, p. 45; 2 Inst. 720.

(*p*) *Ante*, p. 293.

Whenever the poor are incorporated, the founder has the visitatorial power, unless he parts with it by express words; and where an hospital is incorporated as a distinct body, and governors are appointed, they are the visitors; for in point of construction, there can be no end in appointing the governors but to make them visitors, where the revenues are lodged in the poor as a corporation (*q*). But where the governors are incorporated and not the poor, and the revenues are placed in the governors, if, in that case, there were no visitatorial power over such corporation, it would be without control; and it would be useless to give rules on the foundation of the charity, if there was no one to see them enforced; and, therefore, the governors in such a case, will not have the visitatorial power (*r*).

The case of *Sutton's Hospital* (*s*) is not an exception to this rule, for the governors in that case were incorporated by act of parliament, and not the schoolmaster and scholars, and the freehold of the charity was vested in the governors, and their right, as visitors, depends upon the express words of the act of parliament, giving to the founder during his life, and after his death to the governors for the time being, power and authority to visit the hospital.

To all eleemosynary corporations a visitatorial power attaches, as a necessary incident (*t*); for these corporations being composed of individuals subject to human infirmities, are liable, as well as private persons, to deviate from the end of their institution. The law, therefore, has provided, that there shall somewhere exist a power to visit, inquire into, and correct all irregularities and abuses in such corporations, and to compel the original purposes of the charity to be fulfilled (*u*).

A corporation constituted for private charity is entirely private, and wholly subject to the rules, laws, statutes, and ordinances which the founder ordains, and to the visitor

(*q*) 2 Roll. Abr. 241.
(*r*) Gilb. Eq. Cases, 180.
(*s*) 10 Rep. 13, 30, 31.
(*t*) 1 Mod. 85.
(*u*) 1 Bl. Comm. 480.

whom he appoints, and no others; the office of visitor is to hear appeals, of course, and from him alone the party aggrieved ought to have redress; for in him, the founder has reposed such an entire confidence, that he will administer justice impartially—that his determinations are final and examinable in no other court whatever (*v*).

Although visitatorial power may often have been abused or suffered to remain dormant when active interference was required (*w*), it is a convenient jurisdiction for settling private disputes, and has the advantage of being less expensive than either a suit at law or in equity, and was formerly said to have been generally exercised in a reasonable manner (*x*).

The domestic forum of the visitor is peculiarly adapted for determining all disputes which arise between the members of learned societies; and in no instance more so than in the election of fellows of colleges. If the learning, morals, or proprietary qualifications of students were determinable at common law, and subject to the same review as legal actions,

(*v*) *Philips* v. *Bury*, 1 Ld. Raym. 5; *S. C.* Skinn. 447; Show. P. C. 35; 2 T. R. 346.

(*w*) The select committee on the education of the lower orders stated, that they were fully persuaded, that many great neglects and abuses existed in charities which had special visitors; indeed, it so happened, that the worst instance which they had met with belonged to that class in which no visitatorial power had been exercised until recently, although the malversations had existed for many years.—Report from Select Committee on the Education of the Lower Orders, ordered by the House of Commons to be printed, 3rd June, 1818, p. 7.

One of the charity commissioners stated, that the special visitors in most cases are a burden and inconvenience to the charity, because the visitors being exempted from the jurisdiction of the Court of Chancery, are not subject to any control as to the internal management of the charity in any respect; and it frequently happens, that the advantage which might be derived from the visitatorial power, is wholly lost because charities subject to it, are not at all looked into by the special visitors. It was also stated, that in almost every instance, special visitors were not acquainted with the extent of their powers.—Report of Committee on Charities, ordered by the House of Commons to be printed, 30th July, 1835, p. 36; *ante*, p. 320.

(*x*) *Attorney General* v. *Talbot*, 1 Ves. sen. 78; *S. C.* 3 Atk. 662.

great confusion and uncertainty would follow, while the party having a right would be kept out of a temporary advantage (*y*).

The origin of all visitatorial power is the property of the donor, and the power every one has to dispose, direct, and regulate his property, like the case of patronage, *cujus est dare ejus est disponere;* therefore, if either the crown or the subject creates an eleemosynary foundation, and vests the charity in the persons who are to receive the benefit of it, since a contest might arise about the government of it, the law allows the founder, or his heirs, or the person specially appointed by him to be visitor, to determine concerning his own creation (*z*).

Private and particular corporations for charity, founded and endowed by private persons, are subject to the private government of those who erect them; and, therefore, if there be no visitor appointed by the founder in all such cases of eleemosynary corporations, the law appoints the founder and his heirs to be visitors, who are to proceed and act according to the particular laws and constitutions assigned them by the founder (*a*). So that patronage and visitation are necessary consequents one upon another—for this visitatorial power was not introduced by any ecclesiastical canons or constitutions (*b*), but is an appointment of the law, arising from the property which the founder had in the lands assigned to support

(*y*) *St. John's College, Cambridge* v. *Toddington*, 1 W. Bl. 82; *S. C.* 1 Ken. 460; 1 Burr. 158. See 15 East, 144.

(*z*) *Green* v. *Rutherforth*. 1 Ves. sen. 472.

(*a*) Per Lord *Holt*, in *Philips* v. *Bury*, Skinn. 483; *S. C.* 2 T. R. 352, citing *Fairchild* v. *Gayre*, Cro. Jac. 63; Yelv. 60; 8 Ed. 3 Ass. pl. 29. 31.

(*b*) It was said by three judges (in *Philips* v. *Bury*, 1 Ld. Raym. 7, 8), that visitors were introduced by the canon law. It is also said that visitatorial power was borrowed by us from the civil and canon law: for, after the empire became Christian, spiritual houses were subject to the rule and visitation of the bishop of the diocese (Code, lib. 1, tit. 3, c. 40), who was obliged to see that the monasteries observed the rules of their order. Such jurisdiction remained until the popes, by their encroachments, pretended to visit by their own legates.—Gilb. Eq. Cases, 179.

the charity; and as he is the author of the charity, the law gives him and his heirs a visitatorial power—that is, an authority to inspect the actions, and regulate the behaviour of the members that partake of the charity—for it is fit the members that are endowed, and that have the charity bestowed upon them, should not be left to themselves (for divisions and contests will arise amongst them about the dividend of the charity), but pursue the intent and design of him that bestowed it upon them. Where, indeed, the poor, or those who are to receive the charity are not incorporated, but there are certain trustees who dispose of the charity (*c*), there is no visitor, because the interest of the revenue is not vested in those who are to have the benefit of the charity, but they are subject to the orders and direction of the trustees; but where they who are to enjoy the benefit of the charity are incorporated there, to prevent all perverting of the charity, or to compose differences that may happen among them, there is by law a visitatorial power; and it being a creation of the founder's own, it is reasonable that he and his heirs should have that power, unless by the founder it is vested in some other person. There is no difference, in this respect, between a college and an hospital, for both are eleemosynary foundations (*d*), and in both there must be a visitor—either the founder and his heirs, or one appointed by him. A visitor being, of necessity, created by the law, every hospital is visitable, either by the patron, if a lay hospital, or by the ordinary, if spiritual (*e*).

2. *Of visitation in right of the crown.*] Where the king is the founder of an *eleemosynary* lay corporation, or where the king and a private person are joint founders, or where a private person endows a royal foundation, without specially appointing a particular visitor—in all these cases the right of visitation devolves on the king, who visits by

(*c*) Skinn. 484; 2 T. R. 352.
(*d*) See *ante*, p. 24.
(*e*) *Philips* v. *Bury*, Skinn. 484; *S. C.* 2 T. R. 352, 353; *Parkinson's* Case, Carth. 93; *S. C.* 3 Mod. 265; *ante*, p. 325.

his chancellor (*f*), and a prohibition will lie against their visitation by others (*g*); and it is said that the king may visit by special commissioners (*h*).

It was adjudged that the king had an undoubted right to visit the two universities of *Oxford* and *Cambridge*; and that the Archbishop of *Canterbury* had power to visit the whole province in which the universities are situated (*i*).

When a private eleemosynary corporation is created by the charter of the crown, it is subject to no other control on the part of the crown than what is expressly or impliedly

(*f*) Co. Litt. 96, a.; F. N. B. 42; 2 Inst. 68; 2 Roll. Abr. 230. *Eden* v. *Foster*, 2 P. Wms. 326; 3 Bl. Comm. 48.

(*g*) Reg. 406; Com. Dig. Visitor, (A).

(*h*) Dav. 46, b; 2 Rol. 230; Com. Dig. Visitor, (A). See *Anon.* 12 Mod. 233, where a doubt was expressed whether the king could grant the right of visitation in fee, although it was admitted, that he could appoint a temporary visitor.

(*i*) 2 Rush. Hist. Coll. 324—332. See 15 Rym. Fœd. 178—183. *Rex* v. *Gregory*, 4 T. R. 241 n.; 1 Burn's Eccl. Law, 478—482.

By 2 & 3 Wm. IV. c. 19 (private act), certain property mentioned in the schedule to that act is vested in the dean and chapter of *Durham*, and their successors, for ever, in trust to apply the rents and profits thereof for the establishment and maintenance of a university for the advancement of learning, in connexion with the cathedral church of *Durham*; such university to consist of such warden or principal of such professors and readers, in such branches of learning and sciences, of such tutors, students, and other officers and persons; and generally to be established and continued according to such scheme and regulations as the said dean and chapter of *Durham* for the time being shall, from time to time, by writing under their common seal, with the consent of the lord bishop of *Durham* for the time being, order and prescribe. By the second section of the act, the government of the university is vested in the dean and chapter of *Durham*, and the said university is made subject to the jurisdiction of the lord bishop of *Durham* for the time being as the visitor thereof.

By the 15th section of that act, power is given to any person having power to make an absolute disposition, to give, convey, or assure by deed, any messuages, lands, tenements, or other hereditaments, or any estate or interest therein, or any monies, chattels, or effects to the dean and chapter of *Durham*, and their successors, in trust for such university as aforesaid, or for any professor, reader, or other person or persons holding office therein, or connected therewith.

reserved by the charter itself. Unless a power be reserved for that purpose, the crown cannot, by virtue of its prerogative (without the consent of the corporation), alter or amend the charter, or divest the corporation of any of its franchises, or increase them, or add to or diminish the number of the trustees, or remove any of the members, or change or control the administration of the charity, or compel the corporation to receive a new charter (*k*)—although, when an integral part of a corporation is gone, and the corporation has no power of restoring it, or of doing any corporate act, the corporation is so far dissolved that the crown may grant a new charter (*l*).

Where the king erects a school, appoints governors, and gives them land and a power of making bye-laws, they are subject to royal visitation, because the revenues are liable to abuse; and the king, being the curator of his own charities, will not be construed to have parted with the visitatorial power without express words for that purpose.

It is the settled doctrine of the Court of Chancery, that it does not entertain a general jurisdiction to regulate and control charities established by charter, which the court cannot alter. If the governors appointed for the regulation of the charity are not those who have the management of the revenues, that court has no jurisdiction; but if the governors have also the management of the revenues, the court does assume a jurisdiction of necessity, so far as they are to be considered trustees of the revenue. The court will not, in the case of a corporation instituted by charter and act of parliament, for the purpose of governing a charity, take the jurisdiction out of their

(*k*) *Rex* v. *Pasmore*, 3 T. R. 199.

(*l*) *S. C.* 3 T. R. 199.

In cases where certain individuals are incorporated as governors of a school, care should be taken in filling up the vacancies in their number, for if it be reduced to one, there will be no one having a power to do any corporate act, and there is danger of the revenues of the foundation being lost; for, on the dissolution or determination of a corporation, the lands belonging to it do not escheat to the lord, but revert to the donor, or his heirs; 1 Roll. Abr. 816; Co. Litt. 13 b; 1 Lev. 237; 3 T. R. 241; 3 Burr. 1868. Wilmot's Notes, 169. See the Case of *Halifax School*, 2 Carlisle's Hist. of Endowed Schools, 808—813.

hands unless an actual abuse of trust has been committed (*m*).

The free grammar-school of *Birmingham* was founded by King Edward VI. (*n*), who endowed the school, and, by his letters patent, appointed perpetual governors thereof, who were thereby enabled to make laws and ordinances for the better government of the said school; but, by the letters patent, no express visitor was appointed, and the legal estate of the endowment being vested in these governors, it was held that they were not visitors; and that a commission of charitable uses, under the statute 43 Eliz. c. 4, to inspect the conduct of the governors, was well issued (*o*).

Where a charity is one of royal foundation, and no special visitor has been appointed, it seems that any complaint, even as to the misapplication of the revenues, must be addressed, not to the Court of Chancery, but to the great officer there presiding, as exercising the visitatorial power of the crown. Thus where an information was brought to have the increasing surplus profits of a charity-school, founded by the crown, applied for the benefit of the master, who was not a party thereto, but there was a cross bill to have them applied for the benefit of the poor children—Lord *Hardwicke* said, "it was a causeless information; and, although the doctrine was true, in general, that where there is an information it ought not to be dismissed, but there should be a decree to establish the charity according to the intent of the donor, yet that rule relates to private charities: for where there is a foundation for a perpetual charity by the crown, it is established, as well as it can be already, by a higher authority than the Court of Chancery. This is a foundation by the crown, and there is a particular direction by the last charter for the application

(*m*) *Attorney General* v. *Governors of Foundling Hospital*, 2 Ves. Jun. 42. See *ante*, 292—296.

(*n*) See private stat. 1 & 2 Wm. IV. c. 17, for enabling the governors of *Birmingham School* to erect school-houses, and to extend the objects of the charity, and for other purposes.

(*o*) *Eden* v. *Foster*, 2 P. Wms. 325; *S. C.* Sel. Cas. Ch. 36; Gilb. Eq. Cas. 178. See *ante*, pp. 292—296.

of the revenue; and no decree will be made for the establishment of a charity which is properly regulated by charter from the crown" (*p*). A free school, founded by *charter* or by act of parliament, with proper powers, must be regulated, in the first instance, by the charter, not by application to a court of equity (*q*); but where a local visitor is appointed, and a trust is expressed in the original instrument, as to the application of the revenue, the Court of Chancery has jurisdiction to compel a due application, although the charity was a royal foundation (*r*).

Where a charity was founded by a royal charter, and an application was made by petition against the trustees, on a charge of their having misapplied part of the charity funds, but not requiring the interference of the court to regulate the charity, nor to alter or carry it into execution on any principle of *cy-pres*, it was held that the court had jurisdiction to entertain a petition under the stat. 52 Geo. III. c. 101 (*s*).

So in the case of the free-school of *Shrewsbury*, which was founded by Edward VI., who gave the bailiffs and burgesses power to nominate the schoolmaster, and to make ordinances for his direction (with the advice of the Bishop of *Lichfield* and *Coventry*), and also for the preservation of the revenue. In consideration of Queen Elizabeth having increased the revenue of the school, the bailiffs and burgesses agreed to such ordinances as the then head master A. should, with the advice of the bishop appoint, who accordingly made several, relating to the disposition of the revenues and the qualification of the master. Afterwards, the bailiffs and burgesses made bye-laws, that upon every vacancy of a master, the college should nominate a proper person (qualified as required by the ordinance of the master, A.) to the bailiffs, who should nominate such person. By a deed between the bailiffs and

(*p*) *Attorney General* v. *Smart*, 1 Ves. sen. 72.

(*q*) *Attorney General* v. *Middleton*, 2 Ves. sen. 327; *Attorney General* v. *Price*, 3 Atk. 108; *Attorney General* v. *Governors of Harrow School*, 2 Ves. sen. 552; *Attorney General* v. *Corporation of Bedford*, Id. 505.

(*r*) *Ex parte*, Berkhampstead Free School, 2 Ves. & B. 138.

(*s*) *In re Chertsey Market*, 6 Price, 276.

burgesses, and the bishop and the college, they covenanted to perform the bye-laws; and the mode of election prescribed by them had been observed for one hundred and fifty-two years. On an information in the Court of Exchequer, at the relation of the college, to compel the town to nominate, according to the bye-laws and usage, it was objected that Edward VI. having been the founder, was visitor; and that the decree sought to be obtained would interfere with the visitatorial power, and the crown could only visit under the great seal; but it was decided that the court might establish the charity, and although it was insisted that the right of nomination, given by the letters patent, being a naked authority, could not be delegated, the court overruled that objection, for the bye-laws contained only a regulation and not a total delegation of the authority (*t*).

It was incidentally laid down by Lord *Mansfield*, that on the failure of the heirs of the founder of a college, the right of visitation did not devolve to the crown as visitor, but that the jurisdiction over the college devolved to the Court of King's Bench as in the case of other corporations (*u*). But that doctrine has been expressly overruled, and it has been decided, that in the case of a private eleemosynary foundation, if no special visitor be appointed by the founder, the right of visitation, on a failure of his heirs, devolves upon the king, to be exercised by the great seal. Thus in the case of *St. Catherine's Hall, Cambridge*, which was founded and endowed by Dr. *Wodelarke*, who gave certain statutes, and the foundation which consisted of a master and fellows, was confirmed and incorporated by letters patent of the 15 Edw. IV. In 1549, Edw. VI. sent down by commission several visitors to *Cambridge*, to alter and reform the statutes of many of the colleges in the university, and (amongst others) of that college; and it appeared, that ever since that time, (except for a short period in the reign of Queen Mary, as to some part), the college had been governed by the statutes

(*t*) *Attorney General ex rel. St. John's College, Cambridge.* v. *Town of Shrewsbury*, Bunb. 215.

(*u*) *Rex* v. *Gregory*, 4 T. R. 240 n.

as revised and altered by those visitors, and that no visitor was appointed by the founder, whose heirs were extinct. The Court of King's Bench, on an application for a mandamus, refused to interfere to compel the master and fellows to declare one of the fellowships vacant, and to proceed to a new election; Lord *Kenyon* holding, that there was nothing incongruous to the general principles of law, to say that the power of visitation, which at the time when the charity was founded was vested in some body, should then devolve to the king, there being no other person who had any claim to it, to be exercised *cy-pres* to the manner in which it was exercised by the founder and his heirs; such power, though not expressly reserved to the king by the founder, yet belonging to him by operation of law.

What was said by Lord *Holt* (*v*), was considered by the court decisive of the question, and, as the general convenience coincided with it, was entitled to their best consideration; therefore with no decided authority or general principle to the contrary, but with the convenience of the case and the general principles of law in their favour, the court thought they should do more substantial justice to the parties in that particular case, and to the public in general, by refusing to grant a writ of mandamus; and by referring the question to the lord chancellor, than by entertaining jurisdiction over it (*w*).

On a petition to the lord chancellor as visitor of *Trinity Hall, Cambridge*, there being no heir of the founder, to declare the election of a fellow void, and to order the petitioner to be admitted, the Court of King's Bench having in a similar case declined jurisdiction, the lord chancellor heard the petition, and, upon the construction of the statutes, dismissed

(*v*) Upon an application for a mandamus to a college in *Oxford*, after observing that it was a lay corporation, and then the visitation belonged to the founder and his heirs, he said, "and if he die without heirs, I take it the visitation shall go to the king (referring to *Simon de Monford's* Case. 5 Edw. IV.), and this is my private opinion." *Anon.* 12 Mod. 232.

(*w*) *Rex* v. *Master and Fellows of St. Catherine's Hall, Cambridge*, 4 T. R. 233.

it. Lord *Eldon* considered that he acted as if the king was by the foundation special visitor. The question was, whether the petitioner was *idoneus moribus et ingenio*, and turned upon the construction of the word *mores*, which the chancellor thought signified manners as well as morals; and that it would be destructive of the very purpose of the foundation, if he were to order the fellows to elect a person (however otherwise qualified) whose manners were dissimilar to theirs, and whom the whole college had thought unfit to be elected (*x*).

Where an addition is made to the endowment of a college of royal foundation without the appointment of any special visitor by the donor, the power of the lord chancellor, as visitor in right of the crown, will extend to the new gift. Thus where two new fellowships were added to University College, Oxford; Lord *Hardwicke* took cognizance of a complaint respecting them, and determined in a summary way as visitor, and would not permit the matter to proceed in the course of charity causes (*y*).

In a case where a testatrix devised estates for founding additional fellowships and scholarships in a college, and expressly declared, that she appointed no visitor of the foundation, but in case of any complaint arising touching the execution of the statutes presented by her, she directed that an application should be always made to the lord high chancellor or lord keeper of the great seal of *Great Britain*, that the same might be heard by petition, or such other summary mode as his lordship should appoint, and by him be finally determined; and a question was raised whether the king or the heir-at-law of the testatrix was the visitor of the new foundation; Lord *Eldon* said, the king is the visitor of the old college; and the question is, whether, if a person makes an addition to an old foundation, the visitor of that foundation does not become the visitor of the new foundation; and whether the foundress having said that she appointed no visitor, is sufficient to take from him that

(*x*) *Ex parte Wrangham*, 2 Ves. Jun. 609.

(*y*) Cited 3 Atk. 667; 1 Burr. 203.

authority? His lordship had no recollection of any case on the subject, but he thought that if the king was the visitor of the old college, and they accepted an accession to it (which he doubted whether they could do without the king's consent), the king would become the visitor of the new foundation, although the testatrix had said there should be no visitor at all. His lordship thought, that the intention of the testatrix, that the lord chancellor should, under his judicial authority, have jurisdiction to hear any dispute in a summary way by petition, was void; for no individual can prescribe the mode of proceeding in the Court of Chancery, nor give the power the testatrix had attempted to give in that case (*z*).

The Court of Chancery has no jurisdiction with regard either to the election or the amotion of the members of a body corporate of any description; and where, for want of an heir of the founder, the crown becomes the visitor of a charity, the application must be made by petition to the great seal, and not by bill or information for the removal of a governor from the corporate character, which he *de facto* holds (*a*).

And even where the election of governors might be said to have been a fraud upon the court, the lord chancellor declined proceeding to their removal until a petition was presented to him in his visitatorial capacity (*b*); although corporations, constituted trustees, are sometimes by the decrees of the Court of Chancery divested of their trust, where it has been abused, as any other trustees would be (*c*).

Where the electors of the masters of a free school have been designated by the founder; the visitor, even though the visitatorial power should be lodged in the crown, has no

(*z*) *Attorney General* v. *Master of Catherine Hall, Cambridge*, Jac. Rep. 382, 392, 400.

(*a*) Cases of *Grantham School* and *Richmond School*, cited 17 Ves. 499.

(*b*) *Attorney General* v. *Dixie*, 13 Ves. 519.

(*c*) *Mayor, &c. of Coventry*, v. *Attorney General*, 7 Br.; P. C. 235, 2nd ed.; *Attorney General* v. *Earl of Clarendon*, 17 Ves. 491, 499.

right to appoint a master, notwithstanding the electors have made two void elections; the lord chancellor, however, as visitor in right of the crown, will provide for the *interim* management of the school; and refer it to the attorney general, to report what directions or alterations, touching the mode of election, may be necessary (*d*).

By a private act of Parliament for regulating *Bolton School*, the number of trustees was limited to twelve, of whom seven were to constitute a *quorum;* and there was a clause in the act, by which it was enacted, that if any of the constitutions or provisions in the act should be found inconvenient or impracticable, the trustees might apply by petition to the lord chancellor, who might, in a summary way, vary such constitutions or provisions. It having been found impracticable to assemble seven out of the twelve trustees, all of them except two, applied to the lord chancellor, either to increase the number of trustees to sixteen, or to limit the *quorum* to five only. But the lord chancellor thought that was not within his jurisdiction, which, though it might extend to varying bye-laws or particular provisions, did not comprise a power to alter the general constitution of the trust itself, and therefore that the application must be made to Parliament (*e*).

Where the heir of a founder of a charity is visitor, but has been found a lunatic by inquisition, the right of visitation during the lunacy devolves on the crown, to be executed by the lord chancellor; who, on a petition presented to him in his visitatorial capacity, will give directions for the appointment of a schoolmaster, and for the removal of governors improperly appointed, and for appointing others, and for the general regulation of the charity (*f*).

In cases in which it is stated and not controverted, that the crown is the visitor, the lord chancellor, if the case is made out, in point of fact, that any abuse exists, will apply the

(*d*) *Attorney General* v. *Black*, 11 Ves. 193.

(*e*) *Ex parte Bolton School*, 2 Br. C. C. 662. See *Attorney General* v. *Foyster*, 1 Anstr. 118.

(*f*) *Attorney General* v. *Dixie*, 13 Ves. 519.

proper remedies. But the lord chancellor, will not enter into the merits of a petition unless he is satisfied, in the first instance, that the crown is visitor. A clear undisputed case must appear upon the face of the petition, showing that the crown is the visitor; when the lord chancellor, as representing the crown, is called upon to remedy an abuse in a charity, he will not go into a controverted case for the purpose of establishing the fact that the crown is the visitor (*g*).

If, on an appeal to the lord chancellor as visitor of a college in right of the crown, it appears that the crown has any direct interest in the question in dispute, as a right to fill up a vacancy which has occurred, the attorney general must appear on behalf of the crown. In the exercise of visitatorial jurisdiction, the lord chancellor is not bound by any regular and exact forms of proceeding; but the parties may offer to the consideration of the visitor any thing which they may think pertinent and proper (*h*).

The lord chancellor has power to award costs on petitions to him as visitor; and in a case which arose between the fellows of a college, relative to the election of a president, the petitions having been dismissed, the costs were ordered to be paid out of the funds of the college (*i*).

The power of visitation exercised by the lord chancellor is not part of his equitable jurisdiction, but in his personal character; and therefore, where an action had been brought by a solicitor for the amount of his costs incurred respecting an application to the chancellor as visitor of a charity of royal foundation, and the usual order had been made under the statute 2 Geo. II. c. 23, s. 23, for referring such bill to be taxed, it was held, that the proceeding did not come within that act, which only contemplates proceedings in a court of law or equity (*k*). But where a petition had been presented in the year 1813, to the lord chancellor as visitor of a college in right of the crown, touching the same matters as were

(*g*) *In re Garstang Church Town School*, 1 Aug. 1829, 7 Law Journ. Chanc. 169, 172.

(*h*) Case of *Queen's College*, Jac. 19.

(*i*) *S. C.* Jac. 47. See 2 Swanst. 532.

(*k*) *Ex parte* Dann, 9 Ves. 547.

is question in an information and bill filed in 1817, the order for taxing the costs in the suit included specifically those of the petition (*l*).

3. *Of the appointment of special visitors.*] All eleemosynary foundations are by law subject to the visitation of the founder and his heirs, although he may delegate the visitatorial power to any other person and his heirs (*m*). Colleges in the universities being lay corporations of that kind, are subject to the visitation of the founders and their heirs at any distance of time unless special visitors be appointed (*n*).

A local visitor of a college has been described to be "a person distinct from the body of the college itself, but vested with a power and authority of visiting the same under some restrictions of law, for the general benefit of it; he is called visitor *à visitando*, and patron *à patrocinando;* for he is the protector of all its rights, privileges, and immunities; and is in the very place and stead of its founder, to supervise and take care that all the statutes and lawful ordinances made by the founder or other legal authority, respecting the state and condition of the college over which he presides as visitor, be duly kept and observed by the head and all the members thereof; for he is visitor *tam in capite quam in membris*" (*o*).

No technical or precise words are necessary to the appointment of a visitor, it is sufficient if it can be collected, that such was the founder's intention; and all the statutes of a foundation may be examined for the purpose of seeing whether from their whole tenor such power be given, or be intended to be given (*p*).

(*l*) *Attorney General* v. *The Master of Catherine Hall, Cambridge*, Jac. 401, 402.

(*m*) 3 Salk. 381; *Eden* v. *Foster*, 2 P. Wms. 326; *S. C.* Gilb. Eq. Cas. 178; Sel. Cas. Ch. 36; Show. P. C. 45; 3 Salk. 379.

(*n*) *Parkinson's* Case, Carth. 93; *S. C.* 3 Mod. 265; 1 Ld. Raym. 5; 4 Mod. 105; Skinn. 447; Wilmot's Notes, 169. See Bunb. 209; 1 Burn's Eccl. Law, 431.

(*o*) 2 Ayliffe's Hist. of Oxford, 73.

(*p*) *Attorney General* v. *Talbot*, 3 Atk. 662; 1 Ves. sen. 78; *Attorney General* v. *Middleton*, 2 Ves. sen.

The words "*visitator episcopus eliensis sit,*" in a college statute, no Christian name being mentioned, were held to give the visitatorial power to the Bishop of *Ely* and his successors, in the same way as powers given in acts of parliament to bishops or justices will vest in their successors without the words, "*for the time being*"(*q*).

Where the foundress of a college, instead of appointing a visitor by general words, directed by the statutes that the chancellor of the University of *Cambridge* should visit the college once in every year in these words, "*De lectione statutorum.* Item volumus quod dictus cancillarius magistrum et omnes socios et singulos domus prædictæ annis singulis, si opus fuerit poterit visitare, et *si quid inter eos repererit corrigendum* illud cum assensu duorum doctorum vel magistrorum prout in consimilibus superius est expressum debite juxta juris nostrorum statutorum, &c., exigentiam corrigat et puniat."

A second statute gave the chancellor power to interpret the statutes. By a third, the foundress, the Countess of *Clare,* reserved to herself (but expressly not to her heirs) a power to alter the statutes.

Lord *Hardwicke* held, that the direction that the chancellor should visit the college once every year, would alone have been sufficient to create the chancellor visitor, for no particular words are required for that purpose; but it is enough if the intention of the founder appears who should be visitor, and technical words are not necessary. *Si quid corrigendum,* &c., made him general visitor; and if he found a person taking part of the revenues improperly, he might, under the power given him by that clause, remove such person in favour of him who had the right. Besides, in the next place, the founder directed who should construe the statutes and determine any doubt; and by express words, the foundress excluded her own heirs; than which circumstance, nothing

327; *St. John's College* v. *Toddington,* 1 Burr. 158, 201; *S. C.* 1 W. Bl. 71, 90.

912; *S. C.* Fitz. 107, 305; 1 Barn. B. R. 192, 388, 451; Fortes. 298, 2 Br. P. C. 220, 2nd ed.

(*q*) *Bentley* v. *Bishop of Ely,* Str.

could be stronger to show she intended to give a general visitatorial power to the chancellor (*r*).

The founder may delegate the visitatorial power, either generally, or specially, by prescribing a mode for the execution of any part of such power; but if the mode of visitation is prescribed in any particular case, that will take away the general powers incident to the office of a visitor. So a founder may appoint a particular visitor for a particular purpose, and may divide such power by various statutes; in which case the court must collect from the whole, considered together, whom he intended to appoint as general visitor (*s*).

The founder may also appoint a general visitor, and, except some particular cases, out of his general jurisdiction; or may prescribe another mode of proceeding in others, without resorting to the visitor in the first instance (*t*); but where a visitor is appointed generally, his power can be limited only by express terms (*u*).

The visitatorial power may be divided, and the immediate visitors of a charity be subject to a superior visitor, with power to remove them; and such inferior visitors may exercise their office, although the legal estate is in them, if others receive the profits, for then they do not visit themselves.

In the *Attorney General* v. *Middleton* (*v*) a charter (which amounted in the first instance to a license to found a free-school and almshouse), was granted by Queen Elizabeth, who then founded them on the petition of two individuals, *Heath* and *Gilpin*. The governors had a power to appoint and to remove the master and usher, and to do every other matter necessary and expedient for the scholars; but over and above that, there was a control placed over the governors by a power reserved to the heirs of *Heath* and successors of *Gilpin*, as rector of a parish, to appoint governors from time to time, and to remove those governors as often as found convenient.

(*r*) *Attorney General* v. *Talbot*, 3 Atk. 673; *S. C.* 1 Ves. sen. 78.

(*s*) *St. John's College, Cambridge*, v. *Toddington*, 1 W. Bl. 83; *S. C.* 1 Ken. 461; 1 Burr. 158.

(*t*) 1 W. Bl. 84; *Rex* v. *Bishop of Ely*, 2 T. R. 335.

(*u*) *Rex* v. *Bishop of Worcester*, 4 Maule & S. 420.

(*v*) 2 Ves. sen. 327.

Lord *Hardwicke* held, that an information against the master and governors of a school, upon the general principle of the power of the Court of Chancery to call the trustees to an account, as having the general superintendence of all charitable donations and trusts, was improperly brought in respect of the jurisdiction, for there was a visitatorial power, either in the governors themselves, or in the heir of *Heath* and successor of *Gilpin*; and therefore application on account of misbehaviour ought to have been made to the governors, and in case of their refusal to act, then to the rector, &c., to remove them and appoint others.

A rule was made to show cause why a mandamus should not go against the Bishop of *Ely*, commanding him to hear an appeal made to him, as visitor of *Trinity College*, in *Cambridge*, by Dr. *Edward Vernon* (who complained of having been wrongfully deprived of his senior fellowship, contrary to the statutes), made upon affidavits, that the bishop declined hearing the appeal until he could be satisfied that he had a right to visit the college. The court said, "it appears from the affidavits that there has been no appeal to the bishop as visitor; that the bishop has declined exercising any visitatorial power, in order to take the opinion of this court whether he has any right to exercise it. This is a controverted question, and it is not at all clear to the court who is visitor; neither has the court authority to judge of that point, it being the proper province of a jury"(*x*).

Lord *Eldon*, although he decided upon the context of the statutes, in a particular case, that only a limited power of visitation was conferred, said he could conceive cases in which the power to interpret and determine doubts upon the statutes given in clear words, may itself constitute visitatorial power (*y*).

Where a general visitor has been appointed, it has been considered that the crown, in the absence of the reservation of a special power to alter or annul the statutes of a college, cannot enlarge the visitatorial power. Thus it is said, there

(*x*) *Rex* v. *Bishop of Ely*, 1 Wils. 266.

(*y*) *Ex parte Kirkby Ravensworth*, 15 Ves. 314. See *ante*, p. 296.

having been before appointed a general visitor, there remained no farther power in the crown to enlarge the visitatorial power, the court would not determine the question whether, when the crown has given statutes and appointed a visitor, the successor can in any way alter or annul the former statutes; the practice indeed has been otherwise, but it has never been determined to be good (*z*). In another report of the same case, Lord *Raymond* is stated to have added, "that where there is not a concurrence of all parties, new statutes cannot, by law, bind the university or other corporations, or repeal the old ones; he would not, however, be thought to mean that even that concurrence would make the second good"(*a*).

In a college of royal foundation, a dispensation with one of the statutes of the college may be presumed from a practice and opinion contrary to it having prevailed for two hundred and fifty years. Thus where, according to the original statutes, there could only be one fellow of the county of *Middlesex*, but the practice of having two fellows of that county had prevailed for two centuries and a half, Lord *Eldon*, in fully admitting that no usage could justify a violation of the statutes, thought that the usage in that case ought to be referred to a lawful origin, as a form of dispensation for having a third fellow was known in the college, considering that during that long series of years every fellow must have forgotten his oath, if the statutes had been violated; and as the crown could dispense with the statute, and sanction, by a general dispensation, the practice of having two *Middlesex* fellows (*b*).

Lord *Eldon* had previously said, that he was afraid that he should trench upon the powers of the crown if he denied its right to dispense with the statutes of a college: for there were numerous instances to be cited in which the crown has dispensed with the statutes, all of them, however, being

(*z*) *Bentley* v. *Bishop of Ely*, Str. 913.

(*a*) Fitzg. 313. See 1 W. Bl. 84; 1 Ken. 462; 1 Burr. 201; 3 Burr. 1656.

(*b*) Case of *Queen's College*, Jac. Rep. 34, 35.

dispensations *pro hac vice*. But then it was contended that the same power which can give a dispensation *pro hac vice*, can give one not only for the present occasion but also for all times to come. That was a fair question of law, and he stated it as such without then giving any decided opinion on it. But supposing that, in point of law, the crown could not only so dispense *pro hac vice*, but could confer the attribute of perpetuity on such a dispensation, the question was whether such a case ought not to be then presumed. His lordship did not mean to give any definitive decision; but supposing such a dispensation to be legal, and supposing the subsequent question to be tried by a jury, namely, whether such a general dispensation had or had not been given, he should think himself justified in saying that there were very strong grounds for presuming that it had been given. These grounds would be fortified by a reference to what had taken place in the college, and which otherwise never could have taken place consistently with the statutes (*c*).

(*c*) *S. C.* Jac. 20, 21.

In a recent case, an alteration in the statutes of a college, where the crown had reserved a power of altering them, was granted by letters patent, on the petition of a college, the attorney general having previously certified that the change proposed was likely to be beneficial to the college.

Where it appeared—by the petition of the master, fellows, and scholars of *St. John's College, Cambridge*, which was founded by Margaret Countess of *Richmond*, who was authorised by Henry VIII. to make laws for the government of that college—that a code of statutes was drawn up, and afterwards Henry VIII. granted a new body of statutes; and that under a commission, issued by Queen Elizabeth, a more complete body of statutes was drawn up, by which, with the addition of one ordinance, granted by Charles I. under his sign-manual, the college had been since governed; and that King Henry VIII. and Queen Elizabeth explicitly reserved to themselves and their successors the power of altering or abrogating any of the statutes, and of granting new ones; and that by the statute *de sociorum qualitatibus*, the college was restrained from electing more than two fellows from any one county in *England*, or more than one from any diocese in *Wales*; and that the petitioners, in their elections, were frequently obliged to pass over the best scholars and most deserving young men; and that the attorney general had certified that it seemed probable that the advancement of piety and

The provost, fellows, and scholars of *King's College, Cambridge*, appealed to their visitor, the Bishop of *Lincoln*, against the provost and fellows of *Eton College*, that they had been in the habit of holding ecclesiastical preferment, contrary to the statutes of their founder, in violation of the oaths taken by them, and to the injury of *King's College*. The real question was whether, consistently with the statutes of *Eton College*, it were competent to the fellows of that society to hold preferment, in union with their fellowships, beyond the period of one year.

Queen Elizabeth granted a dispensation, enabling each fellow of *Eton* to hold with his fellowship one benefice under forty marks *per annum*. It was contended, by the appellants first, that in the case of a royal foundation, where the crown has given statutes and appointed a visitor, a succeeding king or queen has no more power of dispensing with any of the statutes, than the heir in the case of a private foundation, unless there be some clause especially reserving such a power to the successor. That it did not appear that there was any such reservation in the statutes of *Eton College*, but, on the contrary, there was an express prohibition against the granting a dispensation; 2nd, that the dispensation procured from Queen Elizabeth did not affect to dispense with the oath which the fellows of *Eton College* were required to take on their admission, and that they violated their oath by availing

learning, as well as the interests of the college, might be promoted by acceding to the petitioners' request; and that he was of opinion that the crown might make such alteration in the statutes as were prayed by the petition.

The crown granted and directed that in all future elections into the foundress's fellowships in the said college, the candidates most distinguished in morals and learning, and among those who were equally distinguished, the most indigent might be preferred, in whatever county of *England* or diocese of *Wales* they might happen to have been born, notwithstanding the statutes of the said college; and it was declared that such fellows in Lady Margaret's foundation in the said college as might be entitled to fellowships founded by private benefactors, might be elected into them, and might retain their seniority in the society, notwithstanding such election.—Patent Rolls, 4th March, 1820.

themselves of the dispensation; 3rd, by the taking and holding benefices contrary to the statutes, a system was introduced highly injurious to the succession in the two foundations of Henry VI.; 4th, that a beneficed candidate elect ought to resign his benefice before admission; and that an actual fellow taking ecclesiastical preferment could not hold it beyond the term specified in the statutes, without forfeiture of his fellowship.

The visitor decided against the appeal, and declared that the fellows of *Eton College* were enabled to hold one benefice by virtue of the dispensing statute of Queen Elizabeth; and enjoined all future fellows of *Eton College* not to exceed the indulgence granted by the dispensing statute, by attempting to hold more than one benefice, whether taken before or after their election, in conjunction with their fellowship (*d*).

Where the statutes of a school, founded by charter, appeared never to have been observed, Lord *Hardwicke* said, "that he would presume a repeal of them, as a court of law would do: for the rule of law is, that a corporation has power to make bye-laws. A court of common law will direct a jury to find a bye-law, and on account of non-observance will presume a subsequent bye-law to repeal and alter" (*e*).

In a case where by a decree of Lord Chancellor *Bacon*, twenty-five of the principal inhabitants of the parish were to present and elect a proper minister for the parish of *Leeds;* being thereby appointed trustees to meet for that purpose within four months after the death of the incumbent, with directions to keep the trust filled up; and such presentation by them, or the major part of them, was to be approved of by certain assistant preachers.

An objection was taken to an election on the ground, that no approbation of assistant preachers had been obtained as required by the decree; to which it appeared, that no regard

(*d*) See Williams's Report of the proceedings in the appeal of *King's College, Cambridge*, against *Eton College*, to the visitor who was assisted by Sir William Grant and Sir William Scott, 15th August, 1815.

(*e*) *Attorney General* v. *Middleton*, 2 Ves. sen. 330. See *Mayor of Hull* v. *Horner*, Cowp. 102.

had been paid since the restoration. Lord *Hardwicke* said, as this direction was for the benefit of the parish, and arose by consent; it might be laid aside by common consent, and the general disusage was an evidence of such consent to lay aside that part of the decree as useless. It was to be compared to the case of a presumed bye-law. Where in a corporation the election is vested in a corporation in general, on particular circumstances annexed; and afterwards, that election vested in a select number, and those particular circumstances discontinued; the courts of law presume an ancient bye-law to vary the constitution, the law allowing a presumed bye-law in writing, which does not appear in order to support it; so in that case, he presumed a common consent of the trustees and parishioners, to lay aside that custom; and would not throw the imputation upon all the elections made by the parish since that time, and on the archbishops who had since inducted, as being contrary to the trust, by holding that the election was void for want of the approval of the assistant preachers (*f*).

Where a testator gave an estate to the dean and canons of *Christchurch, Oxford*, and their successors, to support a grammar-school, and to appoint a master and usher, and added these words: "And I do hereby order, that the dean and canons shall, from time to time, order and direct the management of the said school;" and in a scheme for regulating the school, it was proposed that upon all occasions of appointing boys to fill up vacancies among the free scholars, the dean and canons or some proper person to be appointed by them, were to be present, and inquire into the state and condition of the school, and into the conduct of the master and usher, and all persons connected with the management thereof; and should enter in a book to be kept for that purpose, the result of such inquiries, in order that if any abuses were found to exist in the management of the school, the same might be rectified, and making provision for their expenses out of the charity estates, the court

(*f*) *Attorney General* v. *Scott*, 1 Ves. sen. 413.

held, that the provisions as to the visitation ought to be omitted; the proper way being, to leave it to the trustees without directing any particular mode of visiting. For they must generally superintend the school and perform the duty *bonâ fide;* and would then be at liberty, like any other trustees, to charge the expenses fairly incurred in the execution of their trusts. There was no occasion for any limitation as to the amount of the expense to be charged, nor for the visitations to be annual, much less for them to be made whenever a boy was appointed. The appointment of the boys and the visitation of the school were left to the dean and canons generally, and the court declared that the scheme for the management of the school ought not to contain any provision as to visitation (*g*).

On the settlement of a scheme for regulating a school, founded by letters patent of Queen Elizabeth, by which twelve persons were constituted governors, with the power of choosing a schoolmaster, and it was ordained that the rents of the lands should be applied for the support of the master, it was held that the visitatorial power was properly withheld from the governors, who were tradesmen, on the ground that they were not fit persons to exercise the delicate office of visiting a learned institution.

It was declared by the court that the governors of the school and their successors, with the concurrence of the bishop of the diocese for the time being, might suspend and remove the master of the said school, in case of any manifest neglect or misconduct in the discharge of his duties, and might discontinue the salary or stipend of the said master during such suspension; and that when any cause of complaint against the master should arise, which, in the opinion of the majority of the governors or their successors should call for his suspension or removal, the same, with the evidence in support thereof, should be reduced into writing and submitted to the bishop of the diocese, who should forthwith investigate such complaint in such manner

(*g*) *Attorney General* v. *Dean and Canons of Christchurch*, Jac. 474, 487.

should forthwith investigate such complaint in such manner as the said bishop might think fit; and if the bishop, after hearing the master, should be of opinion that the complaint of the governors or their successors was well founded, he should signify his consent in writing to the governors or their successors for the suspension of the said master, for such period as the governors or their successors might suggest, or the said bishop should think fit, for his removal from the said school, as the case might require; and it was ordered that the governors or their successors did give the said master notice of his suspension and of the period thereof; and in case the said bishop should approve the removal of the said master, it was ordered that the said governors and their successors should give the said master notice to quit the said school and school-house at the expiration of three months from the date of such notice, and proceed to elect a new master of the said school (*e*).

It was said, in an early case, that no private laws or statutes of colleges can affect any new gifts made to them, for they must either accept them upon such terms as the donor had appointed, or totally relinquish such gifts; and in such case there can be no inconvenience, for new fellows cannot have any share of the revenues of the old foundation, though they may be capable of holding offices and employments in the colleges, unless prevented by the local statutes (*f*): and in *Jennings'* case (*g*), where it appeared that the Chancellor of the University of *Cambridge* was appointed visitor of *Clare Hall* by the foundress, and another person afterwards added a fellowship to the foundation, a peremptory mandamus was issued to the college, on a dispute respecting the election of a fellow to the new foundation, although the college had returned that there was a visitor. The ground of this decision appears to have been, that the new fellowship was not subject to the original statutes of the college.

(*e*) *Attorney General* v. *Governors of the Free Grammar School of Atherton (Atherstone)*, 8 Aug. 1834, Reg. lib. A. 1833, fol. 1419.

(*f*) *Attorney General* v. *Sir John Platt*, Finch R. 222.

(*g*) 5 Mod. 421.

The general rule now established is, that if a subsequent donor gives a *legal* estate, or a *trust* for a college, without a declaration of a *special* trust, it will fall under the power of the *general visitor* to judge of the legal property in the one case, or the equitable in the other—because, by giving in trust for the college generally, and neither creating a distinct visitor nor a special trust, the donor has by plain implication intended it should fall under the general statutes and rules of the college, and be regulated with the rest of their property; but where a particular trust is created, it must be carried into execution by the Court of Chancery (*h*).

Where new fellowships are engrafted on a college, they will be governed by the same statutes and laws as the original fellowships. Thus, where a testator by his will, dated in 1615, directed 2000*l.* to be laid out by his executors in purchasing 100*l.* a-year lands of inheritance, the rents of it to be employed and distributed towards the maintenance of ten poor scholars of *Clare Hall*, in the University of *Cambridge*, viz., to two poor fellows, *there to be placed* by the testator's foundation, 25*l.* a-piece, and to eight scholars the sum of 5*l.* a-year, his kinsmen, if any be, to be first preferred, and next to them those that were born within the county of *Northampton*, and next to them those that were born in the county of *Lincoln*, that should be fit for the same, the further perfecting thereof was left to the executors: the executors, in pursuance of the will, laid out 2000*l.* in the purchase of lands of inheritance of the yearly value of 100*l.* and upwards; and the then master and fellows having accepted the said donation upon the terms and conditions on which the same was given by the testator, the executors thereupon executed a deed, in 1622, to which they were parties of the one part, and the

(*h*) *Green* v. *Rutherforth*, 1 Ves. sen. 473. See *Attorney General* v. *Governors of Harrow School*, 2 Ves. sen. 552; *Master and Senior Fellows of St. John's College* v. *Todington*, 1 Burr. 158; 1 W. Bl. 87; *Rex* v. *the Master and Fellows of St. Catherine's Hall*, 4 T. R. 233. In *Rex* v. *Jennings*, 5 Mod. 421, it is said, that where a visitor is appointed by the founder of a college, that charities afterwards given to it are not subject to the control of such visitor.

master and fellows of *Clare Hall* of the other; which deed had been ever since in the custody of the master and fellows, and the purchased lands were thereby limited and settled for the perpetual establishment and endowment of two fellowships and eight scholarships, upon the foundation of the testator. From the year 1622 to 1726, the master and fellows of *Clare Hall* pursued the intent and meaning of the foundation without deviating in a single instance: for, during the first one hundred years, every person elected into the said fellowships or scholarships was either of the testator's blood or kindred, or born in the counties of *Northampton* or *Lincoln*.

The first fellow chosen in the college contrary to the will was in 1726; and there had been the same innovation from that time, for the last twenty years, in every subsequent election. In 1743, a fellow upon the testator's foundation resigned his fellowship, whereupon the relator, then a bachelor of arts and born in *Northamptonshire*, offered himself as a candidate; and though there was no other candidate of the founder's kindred, or of any person born in *Northamptonshire* or *Lincolnshire* (in which case the relator, by virtue of the propriety of the foundation, was entitled to be elected into the said fellowship, without the admission of any competitors not qualified as aforesaid), yet the master and fellows put the defendant, not related to the founder and born in *Bedfordshire*, into nomination and competition for the fellowship, and he was, upon the 19th of April, 1744, elected into the said fellowship by the master and fellows (*i*).

(*i*) The plaintiff insisted that the election of the defendant into the vacant fellowship of the testator's foundation, being made in direct contradiction to the express terms of the donation, was as such *ipso facto*, null and void, and the relator, having been the only competitor for the same who was duly qualified according to the intent of the founder, and no objection of unfitness imputed to him, the vacant fellowship ought to have been conferred upon the relator, not barely in preference to, but in exclusion of the defendant, who never was qualified to be a competitor for the same.

The bill was brought to have the propriety of the said foundation of two fellowships and eight scholarships, pursuant to the testator's will,

Lord *Hardwicke* decided, that as *Clare Hall* was a corporation, consisting of masters and fellows, and the power

asserted and established by the decree of the court, and that the fellowships and scholarships might, according to the true intent and meaning of the founder, be declared to have been absolutely appropriated to, and belong in the first place to the testator's kinsmen (if any), and next to them, to those that were born within the county of *Northampton*; and next to them, those that were born in the county of *Lincoln*, and should be fit for the same; and that the election of the defendant into the fellowship might be superseded, and the relator forthwith admitted to and installed in the same; and that the defendant might come to an account with, and make full and adequate satisfaction to the relator for the profits, emoluments, and advantage which might have been made by him, by virtue of the fellowship during his possession and enjoyment of the same.

The defendant, as to so much of the information as sought any relief in the several matters therein mentioned, pleaded, that Edward III. by letters patent under the great seal, granted license to *Lady de Clare*, to found and endow the college or hall called *Clare Hall*, in the University of *Cambridge*, for the perpetual maintenance and subsistence of a master, divers fellows, and scholars in the said college or hall, who should apply themselves to the study of learning; that *Lady Clare*, in pursuance of the license, founded *Clare Hall* accordingly; and they were, by Edward III.'s letters patent, incorporated by the name of the master, fellows, and scholars of *Clare Hall*. That the foundress of *Clare Hall*, for the better regulating the master, fellows, and scholars, made divers statutes and ordinances, to be perpetually observed; and among other statutes, one was set forth, by which it was decided by the court, that the chancellor of the university was visitor.

The defendant insisted, that the chancellors for the time being of the said university had been the visitors of the said hall, and that the chancellor for the time being, his deputy or vice chancellor, had (with the advice and consent of two doctors, if any such there were, or otherwise of two masters of arts, one a regent, and the other a non-regent) determined, and of right ought to determine, all disputes, complaints, and controversies concerning the election and admission of any person into the place of one of the fellows or scholars of the said college, and that such controversies, &c., had not been, and ought not to be determined before any other court of judicature, or in any other manner whatsoever; that the relator had not appealed to the said chancellor as visitor of the said college or hall, to hear and determine the right of election, as he might and ought to have done; that the said chancellor had power and authority to compel the defendant to

given by the charter was to incorporate by that name, not mentioning any number of fellows, but indefinitely; and it appearing by the words "there to be placed" to be the testator's intention that the two new fellows should be incorporated in the college; that the new fellows were engrafted on the original foundation and became members of it, to be governed by the statutes of the college and the rules of its discipline, and consequently subject to the visitatorial power of the visitor of the college, and liable to it not only with regard to amotion, but also with regard to their coming in and election;—the plea was allowed, with liberty for the relator to show that the two fellows were merely nominal, and allowed to live in *Clare Hall* only for the sake of information and instruction; and the allowance of the plea was not to preclude the relator from showing, by other statutes, that the new fellowships were not liable to the general visitatorial power under the original foundation of the college (*k*).

Where an advowson is left to a college, under particular limitations as to the persons to be presented, which limitations are contrary to the general statutes of the college, the visitor has no authority over the presentation, for it is a trust for the whole body, of which he is a member, and he is bound to judge according to the statutes, and the limitations therefore operate to exclude his authority, and therefore the jurisdiction is in the king's courts; and although the presentee has submitted to answer the summons of the visitor, it does not admit the visitatorial authority. Thus where the plaintiff exhibited his bill against the master, fellows, and scholars of *St. John's College*, in *Cambridge*, to oblige Dr. *Rutherforth* to deliver up a presentation, made by the college, of him to

make a full answer upon oath to all such matters as should be complained of against him, touching the election of fellows into the said college or hall, and also to enforce a production of all statute books, &c., relating to any controversy concerning the election or admission of the defendant, or the relator into the place of one of the fellows of the said college or hall; and the defendant submitted, that he was not obliged to make any further answer.

(*k*) *Attorney General* v. *Talbot*, 3 Atk. 662; *S. C.* 1 Ves. sen. 78. See *ante*, p. 339.

the rectory and parish church of *Barrow*, in *Suffolk*, to restrain his having institution and induction thereon, and to present the plaintiff under their common seal, setting forth that *Margaret*, Countess of *Richmond*, mother of Henry VII. founded this college: that Queen Elizabeth gave a new body of statutes to the college, which were accepted by them, and under which they had ever since been governed; that by uninterrupted usage of the college, whenever a benefice became vacant, the senior fellow in divinity was presented, whether he had taken the degree or not: that Dr. *John Bowton*, a fellow, by his will in 1689, devised to the master, fellows, and scholars of the college and their successors, the perpetual advowson of this rectory, on trust that whenever the church should be void, they should present one of his name and kindred, if there should be any capable thereof in the college; if none such, they should present the senior divine then fellow of the college; and on his refusal, the next senior divine, and so downwards; and if all refused, they should present any other person they should think fit; but that whatever fellow accepted it, should be obliged to resign his fellowship and place in the college within one year;—the last incumbent having died in 1749, it was offered to the senior fellow, and on his refusal to the next, till it came to the plaintiff's turn, as next senior on the divinity line, who offered to take it, and they were desired to present him; but the defendant insisted that he, being doctor in divinity, was to be considered as the person described by the testator, and interposed, by appeal, to the Bishop of *Ely*, as visitor; on hearing which, the bishop was of opinion that Dr. *Rutherforth* was within the description of the will, and therefore required them to present him; and that to avoid being censured, they made a special presentation under their common seal; but the plaintiff insisted, that as the advowson was devised to the college under a particular trust by a third person, not the founder, the visitor had not jurisdiction to determine as to the presentation, or to interfere in the execution of the trust, and therefore prayed that the presentation might be cancelled, and that the college might be directed to present him, as entitled under the trust of the will. Dr. *Rutherforth* put in

a plea to the jurisdiction of the Court of Chancery, in which he stated and set forth *verbatim* the will and statutes of the college.

It was said by the court, that if this had been a general bequest of an advowson to the college, without any particular trust annexed, it would have fallen under the general regulations controlling all the other property of that nature, as an object of the visitatorial power; but this is circumscribed by a particular express trust inconsistent with the regulations by which the other property is to be governed, and therefore proper for the jurisdiction of the Court of Chancery, standing on special circumstances peculiar to itself, which puts an end to the visitor's power over it. If it had been devised to a stranger on the same trust, there could then be no pretence to say, that in such case the visitor would have had any power over it; but the college must have been obliged to apply to that court to compel the execution of the trust; and it could make no difference that the college happened to be the trustees. Suppose it had been on trust to present a member of another college, the visitor of this could have no power over it, and the present case differed not in substance from that.

Lord *Hardwicke* overruled the plea on five grounds. First, the rectory in question was no part of the property of the founder of the college, but given by a subsequent donor upon a special trust. Secondly, the trust was limited by rules different from, and in some parts, contrary to the statutes of the college. Thirdly, the visitor had authority to judge only according to the statutes of the foundress, and was restrained from acting otherwise, and consequently had no power to execute the trusts of the testator's will. Fourthly, the bishop could not give remedy in many cases which might arise on the trust. Fifthly, as a consequence from the whole, there was a nullity of jurisdiction in the visitor; and relief must belong to the courts of general jurisdiction (*l*).

(*l*) *Green* v. *Rutherforth*, 1 Ves. sen. 462.

4. *Of the powers of Visitors.*] The founder of a charity is the legislator with respect to the statutes or code of laws prescribed for the regulation of his foundation.

If the power given to the visitor is unlimited and universal, he has, in respect of the foundation and property moving from the founder, no rule but sound discretion. If there are particular statutes, they are the rule by which he is bound; and if he acts contrary to, or exceeds them, he acts without jurisdiction, and consequently his act is a nullity (*m*).

A visitor specially appointed has no greater authority or power than the founder gives him. As visitor, he derives his being, power, and authority from the founder; and if he gives him authority in some things and cases, and not in others, and qualifies and limits such power, the visitor cannot exceed the power and authority which is given to him (*n*).

A visitor appointed by the founder is the proper judge of the laws of the college, and he is to determine offences against them; but where the law of the land is disobeyed, the Court of King's Bench will interfere to carry the law into execution, notwithstanding there is a visitor.

By stat. 1 Wm. & Mary, c. 8, s. 8, it was enacted, that if the master, governor, head, or fellow of any college or hall in either of the universities, should neglect or refuse to take certain oaths, for six months after the 1st August then next following, such mastership, government, headship, or fellowship, should be void. Several fellows of *St. John's College, Cambridge*, not having taken the oaths pursuant to that statute, a mandamus was directed to the head of the college, setting forth the act, and that certain fellows had not taken the oaths, and that they still continued in their fellowships, and commanding their removal (*o*).

By stat. 1 Geo. I. c. 13, s. 12, if any head or member of any college or hall of either of the universities should neglect or refuse to take the oaths required by that act, and

(*m*) *Philips* v. *Bury*, 1 Ld. Raym. 5; *S. C.* Skinn. 447; *Green* v. *Rutherforth*, 1 Ves. sen. 472.

(*n*) *Philips* v. *Bury*, Skinn. 454; *S. C.* 2 T. R. 346.

(*o*) *St. John's College, Cambridge* Case, 4 Mod. 233; *S. C.* Skinn. 393; *Rex* v. *Gower*, 3 Salk. 230.

the person in whom the right of election was vested did not elect some proper person in his place within twelve months after such neglect or refusal, the king might nominate some other person to succeed. By the 13th section of the same act, in case the head of any college or hall refused to admit the person nominated by the crown for ten days after admission demanded, then the visitor or visitors of such college or hall was required to admit such person within one month after demand; and on neglect or refusal, the Court of King's Bench was authorised to issue a mandamus to such visitor or visitors, to admit such person to such place, and to proceed according to the course of the court in such cases.

A visitor is not bound to proceed according to the rules of the common law (*p*). The king's courts, if the college do not exceed their jurisdiction, have no cognizance nor superintendence; but the visitor is the only person to be applied to, and his judgment is final. He does not proceed by the rules and forms of the common law; but he suffers a party *allegare non allegata et probare non probata,* and decides entirely upon the merits. Therefore a sentence of expulsion by the master and resident fellows must be taken to be a right sentence till avoided or set aside by the visitor, who is the sole judge, in the same way as the temporal courts must consider sentences of the ecclesiastical courts as final and conclusive until reversed (*q*).

The powers of a visitor, which are absolute and final, are to receive appeals, and to do all acts incident to that office (*r*).

In the colleges of the universities there are in general, besides the head of the college, two classes, the scholars and the fellows, each class having some rights and priviliges distinct from the other; and where there are only scholars or only fellows, or where the terms scholars and fellows are synonymous, which is sometimes the case, there is generally a distinction between junior and senior fellows, or junior and

(*p*) 2 T. R. 338.

(*q*) *Rex* v. *Grundon,* Cowp. 322. See Carth. 225; 1 Salk. 290.

(*r*) *Attorney General* v. *Talbot,* 1 Ves. sen. 78; *S. C.* 3 Atk. 662; *St. John's College* v. *Todington,* 1 Burr. 158, 201; *S. C.* 1 W. Bl. 71, 90; 1 Ken. 441.

senior scholars. Independent members, usually called fellow commoners, are mere boarders, and have no corporate rights (*s*).

The visitor's jurisdiction is confined to the foundation, and is derived solely from the intention of the founder, with respect to the distribution of his property. Independent members are received into the college by the masters and fellows, subject to their discretionary government, and strangers to the foundation, and therefore have no right of appeal to the visitor; and in the case of any particular grievance, as expulsion from the college, they have no other remedy than that which the laws of the land afford them.

A commoner, who had been admitted to *University College*, in *Oxford*, after having performed the greatest part of his public exercises, and having kept all the terms, within one, requisite for the purpose of taking the degree of bachelor of arts, was expelled the said college. He preferred his petition to the lord chancellor, as visitor of the college, which was of royal foundation, praying that the matter might be taken into consideration; that the master and fellows might be ordered to attend, and that the charters, books, and statutes of the college might be produced and inspected at the hearing of the petition; and that the appellant might be redressed. The lord chancellor having ordered the parties to attend, the college presented a counter petition, alleging that the college was an eleemosynary corporation, consisting only of a master and twelve fellows; and submitting that the commoners—*i. e.* such as pay for their lodging and diet—were independent, neither belonging to the college nor of the foundation, and consequently not entitled to the protection of the visitor. On the part of the college, it was argued, that the visitor's jurisdiction is confined to the foundation, and is derived solely from the intention of the founder with respect to the distribution of his property; that independent members are pupils received into the college by the master and fellows, and submitted to their discretionary government—they are strangers to the foundation; they therefore have no other

(*s*) Cowp. 319; 1 Kyd on Corporations, 329, 330.

remedy, in case of any particular grievance, than that which the laws of the land afford them—they have no appeal in the visitor's jurisdiction; the visitor cannot give costs; and young men of fortune may ruin, or at least harass, the university by continual vexation.

On the part of the appellant, it was insisted that the visitor's jurisdiction is not confined to the foundation, but comprised the whole government of the college; that the independent members, though strangers to the eleemosynary constitution, are not strangers to the college, being recognised, defined, and described in the constitution of the university: for, by the university statutes, a degree cannot be taken by a person not a member of a college; that the same statutes enact the duties, privileges, ranks, and habits of independent members, according to their several orders; that these descriptions and definitions are acknowledged by those laws, which affirm the constitution of the university; that these laws will imply, on the part of the members admitted, *intra mœnia ædis*, submission to the orders and statutes of the society, and on the part of the college protection and redress. The relation, therefore, of these independent members to the college being legally recognised, definite, and certain, they had an appeal to the visitor.—The lord chancellor, with the advice of two common-law judges, dismissed the petition (*t*).

No redress can be obtained in a court of law by an independent member of a college, in a matter concerning its discipline. On a prosecution for an assault in turning out one who had been expelled from *Queen's College*, in the University of *Cambridge*, the Court of King's Bench determined, that such part of the statutes and other instruments of the college as might be proper to invalidate their sentence of expulsion, by showing that it should have been signed by the master and a *majority* of the fellows, it being signed by the master and one fellow only, had been properly rejected as evidence at the trial; for even if the party expelled was a member of the college and subject to its jurisdiction and orders, his mode of redress was by appeal to the

(*t*) *Davison's* Case, cited Cowp. 319.

visitor, and not to the Court of King's Bench—the expulsion being a matter entirely within the jurisdiction of the college, and the visitor might have proceeded upon the contempt and misbehaviour subsequent to the original offence (*u*).

It has been doubted whether the visitatorial jurisdiction can properly be exercised with respect to a person not an actual member of an eleemosynary foundation, but claiming a right to become one. Dr. *White*, the founder of *St. John's College*, in *Oxford*, by the charter of foundation appointed that there should be a president and fifty scholars there, of whom forty-three should be named by particular schools in *London*, and the remaining seven by three cities, of whom *Bristol* was to name two. On a vacancy by resignation, the city of *Bristol* named one *King* as the successor; the college refused to admit him, and chose another. Application being made for a mandamus to admit *King*, it was objected that the Bishop of *Winchester* was visitor, and was to determine all disputes concerning the foundation; to which it was answered, that the person on whose behalf the application was made was only a nominee, and not yet of the foundation, and therefore this dispute was not within the visitor's jurisdiction. The court ordered the statutes of the college to be laid before them, and adjourned the question (*v*).

But in another report of the same case, it was held by the court to be the duty of the visitor to determine matters relating to persons who are of the foundation, and that he has no power before a person becomes a member; and therefore a mandamus was issued to the president and scholars of the college to admit *King*, the scholar nominated by the city of *Bristol* (*x*).

(*u*) *Rex* v. *Grundon*, Cowp. 315. *S. C.* cited 2 Ves. jun. 618.

(*v*) *Rex* v. *St. John's College, Oxford*, 4 Mod. 260.

(*x*) *S. C.* Comb. 238.

All persons have not a right to be admitted members of a college, they must be approved of by the college, or by those to whom the college has delegated the power of exercising a discretion as to the persons they admit. The master and fellows of a college cannot be compelled to admit a particular individual a member. *Rex* v. *Benchers of Lincoln's Inn*, 4 B. & C. 860, 861; *S. C.* 7 Dowl. & R. 351.

In a dispute between a college and a third party, respecting the performance of an agreement, an application to the visitor is nugatory, for he cannot compel a specific performance (*y*). So where an estate is vested in the whole body of a college, as trustees for particular purposes, the visitor cannot interfere with the subject matter of the trust (*z*).

Whether fellows of colleges have power to let their chambers, held in right of their fellowships, is a matter to be determined by the visitor, and not a proper subject of the jurisdiction of the Court of Chancery. Lord *Hardwicke* said, "that if he were to inquire whether a fellow of a college had a right to let his chambers, that he should make wild work, and give an opportunity to half the university to bring bills against particular persons, to discover whether they had forfeited their fellowships by letting their chambers" (*a*).

The exercise of a visitor's power in determining the election of a master of a college is a judicial act, and a judge cannot determine without hearing the parties concerned; and such power should be exercised in a formal manner by at least convening the parties interested, in order that they may have an opportunity of making a defence (*b*).

The visitors and trustee of a free grammar-school, who had dismissed the schoolmaster for breach of regulations contained in the endowment, cannot maintain an ejectment to recover the possession of the schoolhouse, unless they have determined the master's interest therein, by summoning him to appear before them previously to his dismissal, in order that he may be heard in answer to any charges that may be brought against him, and on which such dismissal may be founded. Thus in an action of ejectment by the trustee and visitors of *Skipton* Free Grammar-school, in the county of *York*, for the recovery of the school-house and lands belong-

(*y*) *Rex* v. *Windham*, Cowp. 378.

(*z*) *Green* v. *Rutherforth*, 1 Ves. sen. 462, *ante*, pp. 357—359.

(*a*) *Attorney General* v. *Stephens*, 1 Atk. 360; *S. C.* 2 Eq. Cas. Abr. 196, pl. 17.

(*b*) *Rex* v. *Bishop of Ely*, 2 T. R. 336; *Rex* v. *University of Cambridge*, 2 Ld. Raym. 1334; *S. C.* 8 Mod. 148; Fortesc. 202.

ing to such school, it appeared that the legal estate was vested in the Earl of *Thanet*, heir-at-law of the surviving feoffee or trustee, and that in the deed of endowment the vicar and churchwardens were the visitors of such school. By the deed of endowment in 2 Edward VI. the master was to have an estate for life, with a power for the visitors to remove him for certain causes of misconduct therein mentioned; and it appeared that the defendant was appointed and licensed head master of the school in 1794; that a meeting of the vicar and majority of the churchwardens was called on the 28th of January, 1822, at which it was resolved that the defendant should be removed from the school, and a notice was given him in September, 1822, by the visitors, stating that they had thought proper to remove him from his office of schoolmaster, from which situation he was accordingly removed on the 31st of that month, for an alleged breach of the regulations laid down by the founder for the government of the school; but it was not shown that the defendant had been summoned before the visitors to show cause against the charges alleged against him before his removal, nor that he had been served with notice to quit. The court was clearly of opinion that the defendant could not have been legally removed from his office of schoolmaster without having been previously summoned before the visitors to answer the accusations made by them against him, or the causes on which such removal was founded. The defendant, as a schoolmaster, had a freehold in his office, as well as the legal interest under the deed of endowment by which he was elected, although such interest was determinable in case of a breach of the regulations therein contained; he had continued in the uninterrupted enjoyment of the school for more than twenty years before the action was brought, and the only ground on which it was founded was the misconduct of the defendant or breach of the regulations. His interest in the school could only be determinable on such an event. If the defendant had offended or been guilty of a breach of any of the regulations of the school, he ought to have been summoned before the visitors to defend himself,

or show cause against the charges alleged against him; after which he might have been legally removed (*c*).

A visitor cannot be a judge in his own cause, unless that power be expressly given to him. A founder, indeed, may make him so, but such an authority is not to be implied; he cannot visit himself—the same person cannot be the visitor and the visited; and therefore where the visitor claims an interest and asserts a right in the appointment of the master, and that appointment is the act complained of, the power of deciding devolves on the Court of King's Bench, and a mandamus will be granted if the application be supported by other substantial grounds. Thus where the Bishop of *Ely*, being visitor of a college, asserted a right to the appointment of the master of the college, and that was the act complained of, it was held that the decision of such question which arose on the construction of the statutes of the college, devolved on the Court of King's Bench (*d*).

So where, by a deed founding a school, a power was given to the lord of the manor of the parish of assisting in the nomination and removal of the head master, and of controlling him in various respects, the appointment of the lord of the manor himself to that situation is inconsistent with the provisions of the deed; and the lord chancellor, on petition, declared that such an appointment was inconsistent with the due administration of the trusts of the charity, and that the master should be removed and another appointed in the manner prescribed by the deed of foundation (*e*).

A general visitatorial power may cease and revive, and during such cessation the jurisdiction will, for want of particular appointment or reservation of power, devolve on the king's courts of general jurisdiction. Thus where a mandamus was issued to the Bishop of *Chester* to admit a chaplain of the

(*c*) *Doe* d. *Thanet* v. *Gartham*, 8 Moore, 368; *S. C.* 1 Bing. 357. See *Rex* v. *Gaskin*, 8 T. R. 209.

(*d*) *Rex* v. *Bishop of Ely*, 2 T. R. 338; *Rex* v. *Bishop of Chester*, 2 Str. 797, cited 1 Ves. sen. 471.

(*e*) *In re Risley School*, 1 June, 1830; Reg. Lib. B. 2298—2300.

collegiate church of *Manchester*, the bishop returned that it was a royal foundation, and set forth the constitution. On the exception to the return, the Court of King's Bench ordered a peremptory mandamus, on the ground that it was clear the bishop's visitatorial power was then suspended, for he was warden of the college, and could not visit himself; that powers of this kind might cease and revive without inconvenience; and that at that time the jurisdiction was in the king's courts, because no visitatorial power was in force (*f*).

In consequence of the last decision, the stat. 2 Geo. II. c. 29, was passed, which, after reciting the foundation of the college, by Charles I. appointing the Bishop of *Chester* visitor, and that the then bishop, on account of his being warden of it, could not exercise the power of a visitor, and likewise *that some doubt had arisen whether the king could visit the said church during the suspension of the then Bishop of Chester's power*, enacted, "that during such time as the wardenship of *Manchester* was or should be held *in commendam* with the bishopric of *Chester*, the power of visiting the collegiate church of *Manchester*, was and should be vested in the crown; and that his majesty, his heirs and successors, kings of *Great Britain*, had and should thereby have full power and authority to visit the said collegiate church, according to the tenor of the charter of its foundation."

But by the same act, it was provided, that it should not affect the rights of the see of *York;* and that if any dispute or question should arise concerning the election or admission of any of the then present members or officers of the college, by reason of their not being elected or admitted within the time limited by the charter, these should be determined by the course of the common law, and not otherwise, in such manner as if no visitatorial power were in being.

A visitor of a college has full power, *virtute officii*, to deprive and amove any member of it (*g*). The visitor is to judge according to the statutes and rules of the college. He

(*f*) *Rex* v. *Bishop of Chester*, Ves. sen. 471. Str. 797; *S. C.* 1 Barn. B. R. 52, cited Andr. 181; 2 Burr. 1043; 1

(*g*) *Philips* v. *Bury*, Skinn. 479

may expel, and he may deprive: for it is agreed on all hands, that as visitor he may deprive. If he be visitor as ordinary, an appeal lies from his deprivation; but if as a patron, then none, the deprivation, whether by right or wrong, is good. Although the visitor has no court, and it may seem unreasonable to conclude a man by the sentence of a person who has no court, yet it is immaterial, the only question being whether the visitor has jurisdiction, for if he has jurisdiction and cognizance of the matter and person and gives sentence in the matter, his sentence makes a vacancy, however erroneous it may be, and there is no appeal if the founder has not thought fit to direct one. It is plain, by all the authorities and by the forms of pleading, that the cause of the visitor's sentence is not examinable; if a sentence of deprivation be pleaded, the cause of it needs not be shown—it is not traversable, even in a visitation, when it is by the visitatorial power (*h*).

When the head and members of a college accept a charity, they must be content to enjoy it upon the conditions imposed by the founder; and therefore they are bound to submit to a visitation according to their statutes, and may be deprived for contumacy, though it is not one of the causes mentioned in the statute of deprivation. It is lawful for the members to enter a protest against a visitation, but refusing to submit to the visitor's examination, turning their backs upon him and not appearing upon his summons, is an offence amounting to contumacy: for the visitor is to inquire into the state of the college, and each member's particular behaviour and conformity to the college statutes; and if, on his coming to make such an inquisition, the head or the members absent themselves or will not appear to be examined, it tends to the subversion of the whole constitution of the college, and is a good cause of deprivation; and though there be a particular statute which declares for what causes the head should be deprived (of which contumacy is not one), yet that does not extend to a deprivation in time of visitation, but it shows in

(*h*) *Rastell's Entr.* fol. 1; 11 42; *Philips* v. *Bury*, Skinn. 485; Hen. VII. 27; *Kenn's* Case, 7 Rep. *S. C.* 2 Term. Rep. 353, 354.

what manner the college shall proceed to get the head, if guilty of such offences, removed. The members may complain to the visitor when he is not in his visitation, if the head waste his revenues, or behave himself scandalously, or upon request will not resign, and they may article against him before the visitor, out of his visitation; but when he comes to execute his visitatorial power at the time appointed by the founder, he is to inquire into all the affairs of the college, and he is not to proceed in that case upon the information of the fellows, but he may proceed even to deprivation wherever he sees cause, and contumacy is a good cause of deprivation (*i*).

Offences against the private statutes of a college are not pardoned by an act of grace, but are still inquirable by the visitor (*k*).

Questions which properly fall under the cognizance of the visitor of a charitable foundation, cannot be decided by a court of equity, nor the decision of the visitor, however erroneous, be altered upon bill or information (*l*). And, *à fortiori*, such questions cannot be determined upon petition under the statute 52 Geo. III. c. 101 (*m*).

It was held that the president of *Magdalen College*, in *Oxford*, had no right of appeal to the Court of Chancery against a sentence of deprivation by the visitor, the Bishop of *Winchester*, for the matter was merely temporal, and did not come within the statute 24 Henry VIII. c. 12, which restrained appeals to the Pope, and declared that all matters of spiritual jurisdiction came within the king's authority (*n*).

Where the founder of a charity gave power to the trustees and the survivors to place and displace the chaplain, treasurer, and other officers and merchants, &c. at their will and

(*i*) *Philips* v. *Bury*, Skinn. 490; *S. C.* 2 T. R. 357, 358.

(*k*) *Bentley* v. *Bishop of Ely*, Str. 912.

(*l*) *Attorney General* v. *Governors of Harrow School*, 2 Ves. sen. 552; *Attorney General* v. *Corporation of Bedford*, 2 Ves. sen. 505; *Attorney General* v. *Master of Catherine Hall*, Jac. Rep. 392.

(*m*) *Ex parte, Berkhampstead Free School*, 2 Ves. & Bea. 137; *In re Bedford Charity*, 2 Swanst. 520, 524.

(*n*) *Coveney's* Case, 2 Dyer, 209 a, pl. 20.

pleasure; to make bye-laws and rules for the regulation of the charity and for the government and conduct of the house; and directed the governors and visitors to visit the said college once a year or oftener, if they thought fit, at which time they were to inspect the treasurer's accounts, and also to examine into the behaviour of the chaplain, &c., and if they found they had acted dishonestly and improperly, to displace them and put other persons in their room; and likewise if they found any merchant immoral, guilty of drunkenness, &c. they shall and may remove them. Lord *Hardwicke*, without giving an absolute opinion, inclined to think that the governors had power of removing at pleasure the pensioners of the college, without hearing or giving any reason for so doing: for, by the constitution of the charity, a power of removing the chaplain, treasurer, and other officers was given, and the latter clause, requiring the removal for the general offences there stated, left them to act in every other instance at their discretion. The court appears to have been influenced in this case by the danger of making a precedent of restoring a mere pensioner of an hospital upon his own application, considering the great number of hospitals in the kingdom, and the bad consequences which would follow from examining too nicely into amotions, as if the freehold of a person was in question. The governors of these hospitals every day turning out and putting in, there would be no end of such inquiries, and would be the means of overturning these charities absolutely (*o*). The court considered that it would be much less prejudicial to the foundation if one of the pensioners should be turned out wrongfully, than that the trustees and governors should be perpetually liable to have every action of theirs sifted and examined into: for if the same niceties were observed upon the amotion of some of the pensioners of an hospital as if they had turned out a person from a freehold, no man of fortune or abilities would undertake such a trust.

Several founders of colleges have, in their statutes for the government of such colleges, given a certain degree of pre-

(*o*) *Attorney General* v. *Locke, (Morden College, Blackheath)*, 3 Atk. 164.

ference, in the election of scholars and others, to those of their own blood—concerning which there have been many disputes which have required the decision of visitors.

The college of *All Souls*, in *Oxford*, was founded in the year 1438 (16th Henry VI.), by Archbishop *Chicheley*, who, in the statutes which he published in his lifetime for the better government of the same, gave a certain degree of preference in the election of fellows to his *kinsmen*, and also indulged them with certain peculiar privileges, to which none were to be admitted except those who were clearly of his family and blood, as contradistinguished from strangers; and to the observance of every part of these statutes the warden and fellows are bound by a solemn oath at their admission. An appeal was made to the Archbishop of *Canterbury*, as visitor of the college, against the election of *Vyse* and *Poole*, and praying that the warden and fellows of the college might be compelled to admit *Spencer* actual fellow of that college, as a founder's kinsman, and of the blood, kindred or lineage of the founder, Archbishop *Chicheley*, into one of the fellowships vacant at the time of the said pretended election. *Spencer* and the two other appellants had proposed themselves as candidates at an election for two vacant fellowships of *All Souls' College*. *Wynne* was in the eleventh, *Carne* in the thirteenth, and *Spencer* in the fourteenth degree from the founder, and the college had rejected their claims, admitting their pedigrees and their qualifications, but insisting that consanguinity was worn out at such remote degrees from the founder, and that they were not entitled to any preference. The appellants founded their claim upon certain clauses in the statutes. The name which most usually occurs for the persons intended by the founder is that of *consanguinei;* he also described them in this manner—"*illi qui sunt vel erunt de consanguinitate nostra et genere;*" and again, "*hi qui de nostro sanguine fuerint*" (*p*).

(*p*) The following are the clauses in the statutes upon which reliance was placed :—

"Insuper cum, secundum Apostolum, teneamur bonum facere ad omnes, maxime ad domesticos fidei,

It was argued for the college, that all mankind, being derived from one common parent, are in some degree collateral kindred to each other (*q*); when therefore the founder directed a preference to be given to certain individuals by the name of *consanguinei* or *kindred*, in exclusion of the rest of mankind, whom he denominated *alii* or *strangers*, he must, it was contended (*r*), be supposed to have had in his contemplation some limit or boundary of kindred, within which were included all those whom he meant to distinguish by that preference: for if all persons of any degree of kindred are equally entitled to the distinction, the distinction itself will vanish, and the intended preference will be vain and nugatory —because every candidate, being in some degree or other a *kinsman*, there can be no strangers to be excluded (*s*); and this would have happened at the very foundation of the college (*t*), for as no advantage was given to *proximity*, the founder's first cousin or nephew (the founder himself having had no issue) would then have had no preference before any other of the sons of *Adam*, if the privilege of collateral kindred were held to extend *ad infinitum*; and hence was inferred (*u*) the absolute necessity of some limit, beyond which, though collateral consanguinity does not cease to exist, yet it ceases to be taken notice of and distinguished.

It was further contended by the counsel for the college,

ordinamus et volumus quod in omni electione Scholarium predictorum, futuris temporibus in dictum collegium facienda, principaliter et ante omnes alios, illi qui sunt vel erunt de consanguinitate nostrâ et genere, si qui tales sint, ubicunque fuerint oriundi, dum tamen sint reperti habiles et idonei, secundum conditiones superius et inferius recitatas, sine aliquo probationis tempore, in veros dicti collegii socios ab initio eligantur et etiam admittantur; quibus deficientibus, tunc illi qui sunt vel erunt de locis vel parochiis in quibus possessiones et res spirituales sive temporales dicti collegii consistant, &c. Quod omnes electos seu assumptos (his qui nostro sanguine duntaxat exceptis) per unum annum in eodem collegio stare volumus, antequam in veros socios ejusdem collegii admittantur."

(*q*) Blackst. on Collateral Consanguinity, Law Tracts, 148, 149.

(*r*) *Ibid.* 140.

(*s*) *Ibid.* 144, 149.

(*t*) *Ibid.* 144, 145.

(*u*) *Ibid.* 172, *et passim*.

that at the time of the foundation of the college consanguinity was limited by all laws, and particularly by the canon law (which was then in the highest esteem), to some certain degree. That the civil law, as then understood, limited consanguinity, according to some writers, to the seventh; and according to others, to the tenth degree, in all collateral successions; that the canon law bounded it in many instances, and in respect of marriages and *recusatio judicis*, had stopt it at the seventh; and the common law of this kingdom, in challenges to jurors and sheriffs, at the ninth; and that the Court of Chancery had confined a devise to "*all relations*" to those only who could take, as next of kin under the statutes of distribution (*v*). That by the feudal law, consanguinity originally only took place in the descending line lineally, *ad infinitum;* and though by our law now, it was as indefinite collaterally as lineally, yet the law required a person claiming by descent to prove himself heir, either to the first purchaser or to the person last seised, who was presumed to be of the blood of the first purchaser, that general words might be restrained, and particular words enlarged by the subject matter, and must be expounded always according to the meaning of the person who uses them; and that the founder must mean to have used them in a limited bounded sense, which they always had in a legal signification. That the tenth was the remotest degree admitted by any law; and that *Wynne*, who was the nearest, being in the eleventh degree, all the appellants must be excluded.

Mr. Justice *Wilmot*, who assisted the visitor, thought it was a question of intention; and that if the intention was not repugnant to reason, morality, or the municipal laws of the kingdom, it must be implicitly obeyed. That the founder's intention was to be collected from his words, and that he had himself laid down the rule for expounding them; "*secundum verum literalem et grammaticalem sensum;*" and that the words "*de consanguinitate, genere, et sanguine*" were

(*v*) See *ante*, p. 63, and note (n).

as general, comprehensive, and indefinite as could be found in the Latin language, to take in all persons whatsoever who were of the same blood with the founder, to the remotest generation.

That the principal clause in the statutes upon which the question arose (*w*) showed that the preference of the founder's relations was to accompany the election in all times to come; the perpetuity of the one was as much the object of his contemplation as of the other; they were commensurate and co-extensive, and there is as much reason to limit the duration of the college as the duration of the preference he was giving to his relations in the original constitution of it. Upon the whole, Mr. Justice *Wilmot* was of opinion, that it was clearly the intention of the founder to give a preference to his blood, *ad infinitum*; and that no boundary line could ever be drawn to the consanguinity but by the hand of time, which sooner or later levels all distinctions of families. The visitor pronounced for the appeal in favour of the claimant in the fourteenth canonical degree, and that the pretended election of *Vyse* and *Poole* was void, but gave no costs (*x*).

It had been decided in several early cases where applications were made for writs of mandamus to restore members of eleemosynary foundations, that the sentence of the visitor could not be examined in a court of law (*y*). But the whole doctrine with respect to the power and jurisdiction of visitors of colleges was in a very unsettled state until the famous case of *Philips* v. *Bury* (*z*), in which it was decided, that

(*w*) *Ante*, p. 372, n.

(*x*) *Spencer* v. *Warden and Fellows of All Souls' College, Oxford*, Wilmot's Notes, 163. See Essay on Collateral Consanguinity, Bl. Law Tracts, 139—198; Stemmata Chicheleana, 4to. Oxon. 1765; 1 Burn's Eccl. Law, 485—490. An appeal to the visitor of *Winchester* College, in which it was contended that claims founded on collateral consanguinity had ceased by length of time, was dismissed.—See *Times* newspaper, 1st, 2nd and 3rd Nov. 1831.

(*y*) *Appleford's* Case, 1 Mod. 82; *S. C.* 3 Keb. 102; *Parkinson's* Case, 3 Mod. 265; *S. C.* Carth. 92; Dr. *Widdrington's* Case, 1 Lev. 23; Dr. *Patrick's* Case, 1 Lev. 65; *S. C.* Sir T. Raym. 101; *Rex* v. *New College*, 2 Lev. 14.

(*z*) 1 Lord Raym. 5; Skinn. 447; 4 Mod. 109; 2 T. R. 346; 1 Show. 360.

the acts of a visitor, whether right or wrong, cannot be examined in courts of law, where he has acted within the scope of his jurisdiction; upon the principle, that he is the judge whom the founder has thought proper to appoint.

In an action of ejectment on the demise of *Painter*, as rector of *Exeter College, Oxford*, and the scholars of the same college, to recover the rectory house against Dr. *Bury*, who pleaded, that the said messuage was the freehold and soil of the rector and scholars, and that he was the rector thereof, the jury found a special verdict, by which it appeared (amongst other things), that *Exeter College* consisted of a rector and scholars; that by the statutes of the college, the Bishop of *Exeter* for the time being was appointed visitor with a power to deprive the rector and to expel scholars; and that the visitor had pronounced a sentence of deprivation against Dr. *Bury*, the former rector; after which, the college elected Mr. *Painter* rector. The validity of the sentence of deprivation depended upon whether the visitor had power to give it, and assuming that he had such power, whether the justice of his sentence could be examined in a court of law.

After several arguments at the bar, the Court of King's Bench were divided in opinion; the three puisne judges holding that the court had authority to examine the sentence of the visitor in a collateral action, and that the courts of common law had power not only to correct errors in judicial proceedings, but also to rectify extra-judicial proceedings tending to the oppression of the subject; and that it appeared by the verdict, that the visitor had acted extra-judicially (*a*). And though the founder had an absolute power over his

(*a*) *Bagg's* Case (11 Rep. 99, b.) was cited by the judges, in which it is laid down, "that if a layman is patron of an hospital, he may visit it and deprive the master for good cause; but if he be deprived without just cause, and by colour thereof is ousted, he shall have an assise, because he has no other remedy." *Holt*, C. J., denied this to be law, because the head of a college has no sole seisin nor estate to support a real action nor title to the rents and profits of the college until a dividend has been made. *Philips* v. *Bury*, Skinn. 488; 2 T. R. 355; *S. C.* 4 Mod. 125; 1 Ld. Raym. 9.

foundation, yet he could not exclude the jurisdiction of the common law; no more than if a man should devise lands between A. and B., with a direction, that if any difference arose between them about such lands, it should be determined by C., without process; such a direction would be void, and the party would have his remedy at law. Besides that, the law will not allow any custom which in any manner may tend to the support of arbitrary power; and for that reason, would not permit the visitor to be without control. For those reasons they were of opinion, that they had jurisdiction in that case, where the whole matter was specially found by the jury, to examine and correct the erroneous proceedings of the visitor.

But *Holt*, C. J., was of opinion, that the sufficiency of the sentence of a visitor can never be called in question in the courts of law, nor any inquiry be made there into the reasons or causes of deprivation; if sentence be given by the proper visitor, so created by the founder, or by the law, no inquiry shall be made into the validity or ground of his sentence. Judgment having been given for the defendant, a writ of error was brought to the House of Lords, who concurred in the opinion of *Holt*, C. J., and reversed the judgment of the Court of King's Bench (*b*).

Where, by the statutes of a college, a bishop was appointed to visit a college as often as he should be requested by the rector of the college, and in his absence by the sub-rector and four others at least of the seven senior fellows; and also without any request was authorised to visit the college once in five years—*Holt*, C. J., agreed that such visitor could visit but once in five years, unless requested by the college; and

(*b*) *Philips* v. *Bury*, Show. P. C. 35; *S. C.* 1 Show. 360; 1 Ld. Raym. 5; Skinn. 447; 4 Mod. 106; 2 T. R. 346; Stillingfleet's Works, 3 Vol. 877—885.

One case appears, in which the House of Lords received a complaint from a kinsman of *William of Wykeham*, the founder of *Winchester College*, against the wardens and schoolmaster of that college, who had refused to admit a scholar, and an order was made for his admission at the next election. Lords' Journ. 21 Jan. 1640, Vol. 4, pp. 92, 93.

that if he went uncalled for within the five years, his visitation would be void, and any sentence then given by him a mere nullity (*c*).

Where the visitor had appointed a visitation to be held in the chapel of a college on the 16th of June, and the rector and fellows refused to open the doors on the day appointed, but protested in the area against the visitation, and the visitor called over their names and swore a person to prove the summons, and went away without doing any more, and afterwards he appointed another visitation in the hall of the college on the 24th of July following, and called over the names and registered the act of the 16th of June, and pronounced a sentence of deprivation, notwithstanding a protest by several members against all the proceedings,—such visitation was held good, for what passed on the 16th of June did not constitute a visitation (*d*).

A commission, upon a particular complaint of a fellow of a college, who had been expelled by the rector and fellows, granted by the visitor, appointing a particular commissary to examine the particular wrong supposed to have been done to the party, was held not to be a visitation, on account of its limited object: for though the visitor be restrained by the constitution of the college from visiting *ex officio* more than once in five years, yet as visitor he has a standing constant authority, at all times, to hear the complaints and redress the grievances of the particular members—that is the proper office of a visitor: for visiting is one act in which he is limited to time, but hearing appeals and redressing grievances is his proper office and work at all times. It is like unto the case of all the bishops of *England;* they can visit but once in three years, but their courts are always open to hear complaints and determine causes (*e*).

So, although by the charter founding the free-school of

(*c*) *Philips* v. *Bury*, Skinn. 448, 477; *S. C.* 2 T. R. 348, 349, 357; 4 Mod. 106; 1 Ld. Raym. 9; 1 Show. 360.

(*d*) *Ibid.*

(*e*) Litt. s. 136; *Appleford's* Case, 1 Mod. 83; *Philips* v. *Bury*, Skinn. 478; *S. C.* 2 Term Rep. 348; 4 Mod. 122.

Berkhampstead the warden of *All Souls' College, Oxford*, was directed to visit the school only every third year, Lord *Hardwicke* held that the visitor, if he pleased, might hear complaints within that time (*f*).

The powers of a visitor must be regulated according to the statutes of the college or customs of the place. After the visitor has received an appeal, which he is bound to do if it be not frivolous, he ought of common right to grant an inhibition to stay all further proceedings against the appellant, and to restore him to his former state in the college until the appeal shall be determined; and the visitor ought to require all parties interested in the appeal to appear before him and give an account of their proceedings, which ought regularly to be dispatched in the presence of a notary public or other credible witnesses, in order that the proceedings may be transmitted to the visitor with the evidence (*g*). He may administer an oath or require an answer upon oath, and ought to give a convenient time for an answer and for the examination of witnesses (*h*).

Although a visitor, in all inquiries and determinations made either by way of general visitation or on a particular complaint, proceeds in a summary way, and is bound to pay more attention to matters of necessary substance than of positive form, yet the cause of complaint ought to be reduced into writing, and notice of it given to the party complained of, and no proceedings ought to be taken against an absent party until he has been cited; and particular regard must be paid to the positive forms prescribed by the statutes (*i*).

If a person acts as visitor without any right, or exceeds his authority, or intermeddles with a matter out of his jurisdiction, a prohibition lies against him (*j*). So a prohibition will be

(*f*) *Attorney General* v. *Price*, 3 Atk. 108. See Rep. of Committee on Charities, 30th July, 1835, p. 32.

(*g*) 2 Ayliff's Hist. of Oxford, 81.

(*h*) *Ibid.* 94, 95.

(*i*) *Ibid.* Com. Dig. Visitor (C).

(*j*) 2 Mod. 367; 4 Mod. 110; Fitz. 108, 305; 1 Wils. 206; 1 W. Bl. 22, 158; 1 T. R. 650; Com. Dig. Visitor (B); 2 Ayl. Hist. of Oxford, 80, 94.

granted where the visitor proceeds contrary to his citation or inflicts penalties different from those prescribed by the statutes (*k*). If no person applies to the court who claims the visitatorial power, except one who has long exercised it, the court will not grant a prohibition on the motion of a single fellow, who suggests that the power is in another (*l*).

Visitors of colleges are not tied up to any particular forms, nor to be prohibited in their proceedings for informality in their acts, but only for want of jurisdiction; and therefore where a visitor cited the master of a college to appear before him as *special* visitor, and afterwards in a plea to an action of prohibition, he insisted on being *general* visitor of the college, this variance was held not to be erroneous; but he, having jurisdiction either in the one character or the other, had a right to proceed upon the citation (*m*).

Where the right of the visitor to interfere is submitted to by answering an appeal to him, such admission will not give a jurisdiction the visitor had not, nor take away the ordinary jurisdiction of the courts, or even bind the parties themselves (*n*). In the case of a private particular limited jurisdiction, and of courts proceeding by rules different from the general law of the land, no appearance, answering, or pleading of the party will give a jurisdiction of the court; but if there is a want of jurisdiction in the cause, it may be called in question at any time even after the sentence, which is the case of prohibitions frequently granted by the common law courts for a nullity of jurisdiction; so that it may be applied for even against the party's own suit, and the same holds in a collateral action or suit (*o*).

5. *Of interference by mandamus in cases of eleemosynary foundations.*] The writ of mandamus is a prerogative writ,

(*k*) *Bentley* v. *Bishop of Ely*, 1 Barnard. 192.

(*l*) *Martyn* v. *Archbishop of Canterbury*, Andr. 258.

(*m*) *Bishop of Ely* v. *Bentley*, 2 Br. P. C. 220, 2nd ed.; *S. C.* Str. 912. See Biographia Britannica, vol. 2, 2nd ed. p. 238.

(*n*) 2 Rol. Ab. 312, pl. 14; 1 Ves. sen. 470.

(*o*) *Green* v. *Rutherforth*, 1 Ves. sen. 471.

containing a command in the king's name, and issuing from the Court of King's Bench, directed to persons, corporations, or inferior courts of judicature within the king's dominions, requiring them to do a certain specific act, as being the duty of their office, character, or situation, agreeably to right and justice. This writ affords a proper remedy in cases where the party has not any other means of compelling a specific performance. The object of the writ is not to supersede legal remedies, but only to supply the place of them or the want of another remedy equally effectual for answering the purpose required. The only proper ground of the writ is a defect of justice (*p*). The writ is confined to cases of a public nature (*q*). There ought in all cases to be a specific *legal* right, as well as the want of a specific legal remedy, in order to found an application for a mandamus (*r*). Lord *Ellenborough*, C. J. said, "the result of the cases was, that the court, in the exercise of its authority to grant the writ of mandamus, will render it, as far as it can, the suppletary means of substantial justice in every case where there is no other specific legal remedy for a legal right; and will provide as effectually as it can that others exercise their duty wherever the subject matter is properly within its control" (*s*).

A party applying for a mandamus must make out a *legal* right, and the court will not interfere where the right is merely equitable, although, if a legal right be shewn and there be also a remedy in equity, it is no answer to an application for a mandamus: for where the court refuse to grant a mandamus, because there is another specific remedy, they mean only a specific remedy at law (*t*).

It has always been said, that the Court of King's Bench will not interpose by granting a mandamus, unless the party making the application has no other specific legal remedy.

(*p*) 2 Burr. 1267; Selw. N. P. Mandamus, sect. 1; *Rex* v. *Severn and Wye Railway Company*, 2 B. & Ald. 646.

(*q*) *Rex* v. *London Assurance Company*, 5 B. & Ald. 901.

(*r*) *Rex* v. *Archbishop of Canterbury*, 8 East, 219.

(*s*) *Rex* v. *Archbishop of Canterbury*, 15 East, 136.

(*t*) *Rex* v. *Marquis of Stafford*, 3 T. R. 651.

It must be a legal and specific remedy. Some cases have occurred, where the court granted a mandamus even though the party had another special remedy, such as an assise of office; but those offices have generally been such as were created by letters patent; and it is peculiarly the duty of the court to see that the powers created by the king's charters are properly exercised. Besides, in these cases, though the party had a remedy by assise, yet it is now obsolete; and therefore those cases have been made an exception. Therefore the court refused to grant a mandamus to a bishop to license a curate of an augmented curacy, where there was a cross nomination, because the party had another specific remedy by *quare impedit* (*u*).

On a commission of charitable uses, it was agreed between the lord of the manor of A. and the inhabitants of W. within the manor, that certain copyhold lands should be let for the maintenance of a stipendiary curate of the chapel of W., to be nominated by a majority of the inhabitants, and to be allowed by the lord, and by him presented to the ordinary for license to preach: the usage of nominating, &c., had been pursuant to the agreement. The lord having refused to allow and present the nominee of the majority of the inhabitants, the latter prayed a mandamus, which the court refused; for their right is either a mere trust, and their remedy is in equity, or it is a legal right, and then a *quare impedit* will lie. If the right of nomination be in one, and of presentation in another, and either impede the other in his right, a *quare impedit* lies. Where the right of nominating is in A. and of presenting in B., B. is to judge of the qualification of the person nominated, in the same manner as a bishop does; but if the person presenting object to the nominee on the ground of immorality, that must be tried by a jury (*v*).

A mandamus lies to restore to any office of which the

(*u*) *Rex* v. *Bishop of Chester*, 1 Term Rep. 396; *Powel* v. *Milbank*, Id. 399, n.

(*v*) *Rex* v. *Marquis of Stafford and another*, 8 Term Rep. 646. See *Attorney General* v. *Marquis of Stafford*, 3 Ves. 77.

holder is dispossessed, and which draws after it temporal and certain rights, provided the party has no other specific remedy, and will be granted to restore a curate to his chapel (*w*); or a schoolmaster of a grammar school, founded by the crown (*x*).

A mandamus was directed to the master and fellows of *Caius College, Cambridge*, to restore an usher of a free school, of which they were visitors. But *Glyn*, C. J., doubted whether the writ would lie, and said, that by the same rule that a schoolmaster should be restored, every scholar might claim to be restored; and conceived that the visitors might remove the master of the school if he did not observe the rules for its government (*y*). And *Twisden*, J., said, that it did not lie for an usher of a school in *Cambridge* (*z*).

A mandamus has been granted to restore a master of arts and doctor of divinity, who had been improperly suspended, to his degrees (*a*).

A mandamus lies to admit a dissenting minister to the use of his chapel. Where a meeting-house was vested in trustees, in trust (amongst other things), "to suffer the meeting-house to be for the public worship of God by such congregation of protestant dissenters, called Presbyterians, as should sit under and attend the ministry of *John Enty* or such other Presbyterian minister or ministers as should, in his and their room successively in all times then coming, be by the *members in fellowship* of the said or such like congregation or congregations, regularly and fairly chosen and appointed to be the minister, preacher, or pastor to preach in the said meeting."

On the application of a party who had been duly elected

(*w*) *Rex* v. *Blooer*, 2 Burr. 1043; 1 W. Bl. 300; *Rex* v. *Parker*, 3 Burr. 1265.

(*x*) *Rex* v. *The Bailiffs of Morpeth*, 1 Str. 58. See *Anon.* Lofft. 549.

(*y*) *The Protector* v. *Craford*, Styles, 457. See *ante*, 365—367.

(*z*) *Stamp's* Case, 1 Sid. 40; Dr. *Goddard's* Case, Id. 29; 2 Sid. 112.

(*a*) *Rex* v. *University of Cambridge*, Selw. N. P. 1013. See Vin. Abr. Mandamus (B), pl. 7; 6 T. R. 89.

for a mandamus requiring the trustees to admit him to the use of the pulpit of the chapel as minister; grounded upon an affidavit of the endowment of the pastorship, and the election of the claimant by a majority in whom the right to elect was vested, and who was removed from the possession by the trustees, and a demand and refusal of the use of the meeting-house.

Lord *Mansfield* held, that since the act of toleration (*b*), the remedy by mandamus ought to be extended to protect an endowed pastor of protestant dissenters by analogy, to the case of a lecturer, preacher, schoolmaster, curate, or chaplain. The deed is the foundation or endowment of the pastorship. The form of the instrument is necessarily by way of trust; for the meeting-house and the land upon which it stands could not be limited to the former chaplain and his successors. Many lectureships and other offices are endowed by trust deeds; the right to the function is the *substance*, and draws after it every thing appurtenant thereto. The power of the trustees is merely in the nature of an authority to admit. The use of the meeting-house and pulpit in this case follows, by necessary consequence, the right of the function of minister, preacher, or pastor, as much as the *insignia* do the office of mayor, or the custody of books that of the town clerk. The writ was granted on the ground, that if denied protestant dissenters and their religion would be put out of the protection of the law where no other remedy than mandamus could be applied, which is to be used where the law has established no specific remedy, and where, in justice and good government, there ought to be one (*c*).

So a mandamus lies to justices of the peace to admit a dissenting minister to take the oath of allegiance and subscribe the declaration required by the toleration act, in order to qualify him to preach (*d*).

(*b*) See *ante*, pp. 101, 102.

(*c*) *Rex* v. *Barker*, 3 Burr. 1265; *Jenkins*, 3 Ves. & B. 155; *Attorney General* v. *Lock*, 3 Atk. 167. *S. C.* 1 W. Bl. 352. See *Davis* v.

(*d*) *Peat's* Case, 6 Mod. 310.

Upon an application for a mandamus to be restored to any office, the party applying must make out a *primâ facie* title, and show at least that he has complied with all the forms necessary to constitute his right.

The court refused to grant a mandamus to the trustees of an endowed dissenting meeting-house, to restore a minister of it, because it did not appear that he had complied with the requisites necessary to give him a *primâ facie* title, adding that a mandamus to *admit* was granted merely to enable the party to try his right; but the court had always looked more strictly to the right of the party applying for a mandamus to be *restored:* for if he had been before regularly admitted, he may try his right by action for money had and received for the profits. Therefore, in order to entitle himself to this extraordinary remedy, he must lay such facts before the court as will warrant them in presuming that the right is in him, whereas here no facts have been stated to show the ground of his title (*b*).

So where the trustees of a chapel of dissenters who, for want of a pastor, had been without a congregation, engaged with a new pastor for a year at a salary, who gave notice in the papers of opening the chapel; and, on the first day of opening, gave notice to the congregation there that they should proceed to an election of a pastor after divine service that day, and accordingly took votes. Upon being dispossessed by the trustees after the year, the pastor applied for a mandamus to be restored, alleging that he was elected by the congregation for life. The court refused to grant it, on the ground that supposing there was a competent body to elect there was not sufficient notice given of the election, and therefore they left the party to try his right in an action. As a foundation for such an application, there must be a probable colour of an election laid before the court (*c*).

A mandamus was granted to compel the warden of a college to affix the common seal of the college to an answer of

(*b*) *Rex* v. *Jotham*, 3 Term Rep. 575.

(*c*) *Rex* v. *Dagger Lane Chapel*, 2 Smith, 20.

the fellows and scholars of the college to a bill in chancery, contrary to his own separate answer. Thus on an application by the majority of the fellows of *Wadham College* to the Court of King's Bench for a mandamus to be directed to the warden of the college, to compel him to affix the common seal of the college, to an answer of the sub-warden, bursars, dean, and principal officers of the college, to a bill filed in chancery against the warden, fellows and scholars: the object of the bill was to compel the execution of a lease, according to an agreement alleged to have been made by the college, but which the fellows insisted was not made by a majority of them, as it ought to have been. The warden disapproved of the answer of the fellows, and therefore had refused to put the seal of the college to it. The Court of Chancery had staid process of contempt in mercy to the acquiescing parties, and the court granted the mandamus (*d*). The head of a college, by affixing the common seal to an answer of the other members, does not thereby contradict his private separate answer (*e*).

Where, by the statutes of a college, the fellows are to nominate two persons to the visitor, by an instrument under seal, to which the visitor is directed to give implicit confidence, of which two persons the visitor is to choose one to be the head of the college: this does not concern him in his capacity of visitor; and if he reject the nominees of the fellows and name a third person on the ground of their not having followed the statutes, a mandamus will issue, if it appear that they have acted conformably to the statutes.

Upon an application for a mandamus to the Bishop of *Ely* to appoint one of two persons whom the fellows had nominated and elected to the office of master of *Peterhouse*, in *Cambridge*, it appeared by the affidavits, that a vacancy happened by the death of the late master, and that the fellows proceeded to an election; that at that time there was only one fellow of the college (Mr. *Borlase*) who was duly

(*d*) *Rex* v. *Windham*, Cowp. 377. 1 W. Bl. 547.
See *Rex* v. *University of Cambridge*, (*e*) *Rex* v. *Windham*, Cowp. 378.

qualified by the statutes, whom they returned to the bishop together with another person (Mr. *Barnes*), who was a member of another college: it also appeared that Mr. *Longmire*, who had formerly been a fellow of *Peterhouse*, but had for some time before ceased to be such, still kept his name on the college boards. This nomination, so made by the fellows, was rejected by the bishop, who appointed Mr. *Longmire*, either under an idea of his general visitatorial power, or of a lapse in consequence of the fellows not having made a proper nomination; and the question was, whether Mr. *Longmire* ought to have been preferred to a person who was member of another college? Two objections were made on the part of the bishop to the application for a mandamus for him to appoint either Mr. *Borlase* or Mr. *Barnes* to be master of the said college;—first, because the court had no jurisdiction upon the subject, the bishop having acted as visitor, whose decisions are final; and, secondly, that admitting his determination not to be conclusive, he had put the right construction upon the statutes: if so, whether he had acted under his visitatorial authority or not, the court ought not to grant a mandamus.

The court decided that the case was not within the bishop's visitatorial power; since the statutes of the college had restrained him from making use of that power in the present instance, admitting that in every case within a visitor's power, and where he sits in the exercise of that power, his acts are not to be questioned in courts of law. The founder had thought fit, by the statutes, to invest the Bishop of *Ely* with general visitatorial power; but he had a right to restrain him in certain cases, if he thought proper; and as to those objects, the bishop was not visitor. On the construction of the statute for the election of a master, the power of the bishop was held to be limited and restrained; and that he could not interfere as visitor; the only power which he could exercise being to judge of the fitness of the two persons nominated by the fellows. It was also held by the court, on the construction of the statute of the college, that it was the intention of the persons making it that the fellows should judge of the

fitness of the respective candidates, they being supposed to be more conversant with their qualities than the bishop, who resided at a distance; and for that reason, it might be proper to repose such confidence in them, every precaution having been taken that the fellows should not elect any but those who were proper, by obliging them to take a solemn oath not to nominate any person out of favour or affection. Such power having been given to the fellows, had expressly excluded the bishop from interfering in their choice, who was required to give full faith and credence to the propriety of their nomination, so that he was only to act ministerially; at the most he had only a discretion left him as to which of the two he would prefer—beyond that he was restrained by the statute, and the right of nomination was no object of the bishop's visitatorial power. Another reason given why the Bishop of *Ely* had no visitatorial power in the present case was, because the same powers were given indiscriminately to the bishop; or in case of the see being vacant, to the guardian of the spiritualities, and it was clear that such guardian was not a visitor. The court being also of opinion that the two persons returned by the fellows were proper objects within the statutes of the college, made the rule for the *mandamus* absolute (*f*).

It was formerly a controverted question whether, if the visitor refused to receive and hear an appeal, the Court of King's Bench would compel him by mandamus. In the first case on this subject, a fellow of *University College*, in *Oxford*, having been expelled from the college, wished to appeal to the vice chancellor and convocation as visitors, who refused to receive the appeal; and on an application for a mandamus to compel them, some doubts were entertained as to the fact of their being visitors, and the court desired the statutes of the college to be laid before them; and said that they would consider the propriety of granting the mandamus, but what afterwards became of the case does not appear (*g*). In ano-

(*f*) *Rex* v. *Bishop of Ely*, 2 Term Rep. 290, *ante*, p. 367.

(*g*) *Usher's* Case, 5 Mod. 452.

ther case, Lord *Hardwicke* is reported to have said, that "he did not know any instance of the court having granted a mandamus to a visitor to execute his power, though, at the same time, he did not know but the court might do so; for it is a kind of jurisdiction—*forum domesticum*, not taken notice of by the common law" (*h*).

An application was made to the court for a mandamus to be directed to the Bishop of *Ely*, commanding him to hear an appeal made to him as Visitor of *Trinity College, Cambridge*, by Dr. *Vernon*, who complained that he had been wrongfully deprived of the senior fellowship of the college. The application was founded on affidavits, that the bishop had declined hearing the appeal, until he should be satisfied that he had a right to visit the college. The bishop's right to visit was grounded on a body of statutes, given to the college by Edward VI., in which, among other things, the Bishop of *Ely* for the time being was appointed to be visitor, and Dr. *Vernon* swore that he believed those to be the statutes which were binding on the college.

On the other side, it appeared that those statutes had never been put in execution, that the Bishops of *Ely*, for 200 years, had not visited the college, and that such statutes were not enrolled. That another body of statutes was given to the college by Queen Elizabeth, in which no notice was taken of those of Edward VI., although, in many respects, contradictory to them; that all the members of the college took an oath that they would observe the statutes of Queen Elizabeth; and that neither the book of the statutes of Edward VI., nor any copy of it, was to be found in the archives of the college.

The court observed, that it was a controverted question, and that it was not at all clear to them who was visitor; and they declined giving an opinion, whether a mandamus ought to be granted, in any case whatever, to hear an appeal. It was well known that the court could not grant a mandamus to compel any person to exercise a jurisdiction to which he

(*h*) Dr. *Walker's* Case, Cases temp. Hardwicke, 218.

was not most clearly appointed, and which he was bound by the law to exercise. In the present case, if a mandamus were granted, it must be on the supposition that the bishop was visitor: this supposition might be false; and then if the writ were granted, and the right of visitation should afterwards be found to be in the crown, the attorney general might come for a prohibition, so that the court would be acting most absurdly by commanding and prohibiting a man to exercise one and the same jurisdiction (*i*).

It is now settled, where there is no question in whom the right of visitation is vested, and a visitor refuses to receive and hear an appeal, that the Court of King's Bench will compel him by mandamus to exercise his visitatorial power; but that court will not interfere for the purpose of compelling him to give a particular decision upon the merits, or to control his judgment. And the visitor is not obliged to hear the party personally, or to receive parol evidence; but it is sufficient if the visitor receives the grounds of the appeal, and gives an answer to it in writing (*k*).

In the case of *Rex* v. the Bishop of *Lincoln* (*l*), where a mandamus was prayed to the bishop, as visitor of *Lincoln* College, *Oxford*, to compel him to receive, hear, and determine an appeal of Dr. *Halifax*, who complained of an undue election to the office of rector of that college, to which Mr. *Horner* had been admitted, the court determined, that where by the statutes of a college a visitor is appointed, who is to interpret the statutes, and an appeal is lodged with him, the court will compel him to hear the parties, and form some judgment, though they will not oblige him to go into the merits; for it is sufficient if he decide that the appeal comes too late.

Where the founder of an eleemosynary corporation, by deed 28 Elizabeth, made by virtue of an act of parliament, granted that the same should be for the sustentation of poor, needy, and impotent people, and especially of such as should

(*i*) *Rex* v. *Bishop of Ely*, 1 Wils. 266; *S. C.* 1 W. Bl. 52.

(*k*) *Rex* v. *Bp. of Ely*, 5 T. R. 475.

(*l*) 2 T. R. 338, n.

be maimed in the wars in the service of her majesty, to consist of a master and twelve brethren, to be appointed by him and his heirs; and that it should be governed by such rules and ordinances as were annexed, or at any time thereafter should be made by him; and afterwards he made certain ordinances that the people of certain towns and lordships should be preferred to the places aforesaid before any other, according to a certain rotation; and that the bishop, dean, and archdeacon of *Worcester* should be the visitors, and should correct, punish and reform all abuses and offences to be committed by the master and brethren, and see that his ordinance was duly executed according to its meaning, and afterwards the heir of the founder upon a vacancy of one of the brethren, appointed a person to succeed, who was a soldier maimed in the wars, and poor and impotent, but not belonging to either of the towns or lordships mentioned in the rotation, against which appointment three persons belonging to the town, next in the order of rotation, who were poor and impotent, and some of them wounded in the service, appealed to the visitors, on the ground that the appointee was ineligible, and that there were others besides themselves belonging to the said town who were eligible, it was held that such appeal well lay, and therefore the court granted a mandamus to the visitors, who had heard the evidence in such appeal, but declined to act therein, to proceed and determine the appeal (*m*).

By stat. 10 & 11 William III. c. 8, certain tolls were imposed upon vessels navigating the river *Tone*, the surplus of which, after purchasing the interest in the navigation, and in making and keeping the river navigable, was to be applied by the conservators in building hospitals, or otherwise for the better educating and maintaining poor children of certain parishes in the act mentioned; and the accounts of the receipts and disbursements of the conservators were to be brought before the Bishop of *Bath and Wells*, and the justices of the county of *Somerset*, or any five or more of them, who were to exa-

(*m*) *Rex* v. *Bishop of Worcester*, 4 Maule and Selw. 415.

mine and allow the accounts at the next general quarter sessions to be held after the 24th June. The justices having examined and allowed the accounts, the bishop not having been proved to be present, and the Commissioners of Charitable Uses having examined the accounts, it was held that they had no authority to do so, the bishop and justices having a summary jurisdiction, and if they neglected to put it in execution, a mandamus would lie (*n*).

A mandamus will not be granted to restore a fellow of a college, because the visitor is the proper judge (*o*); or a chaplain of a college (*p*); or almswomen who only hold at will; nor boys at the charter-house or blue-coat schools (*q*). And it seems that it will not lie to turn fellows out of a college for not taking oaths, unless they are parties to the writ (*r*).

A mandamus does not lie to compel admission to the degree of barrister. The inns of court are voluntary societies, which for ages have submitted to government analogous to that of other seminaries of learning; but all the power they have concerning admission to the bar is delegated to them by the judges who act as visitors of the different societies; therefore, the remedy of a party who is refused admission to the bar is by appeal to the twelve judges (*s*). And the Court of King's Bench will not interfere by mandamus to control the discretion of the benchers in refusing to admit an individual a member of their society, with a view to his qualifying himself to be called to the bar (*t*).

(*n*) *Gunston* v. *Dare*, 1 West's Rep. temp. Hardwicke, 573.

(*o*) *Parkinson's* Case, 3 Mod. 265; *S. C.* Carth. 93; Case of the *Warden of All Souls' College*, Sir T. Jones, 174; Dr. *Widdrington's* Case, Sid. 71; *S. C.* 1 Keb. 234; *Appleford's* Case, 1 Mod. 82; 1 Lev. 23, 65; 2 Lev. 14.

(*p*) Carth. 168.

(*q*) *Rex* v. *Wheeler*, 3 Keb. 360.

(*r*) *Rex* v. *Gower*, 3 Salk. 230. See *Rex* v. *St. John's College, Cambridge*, Comb. 279; *S. C.* Skinn. 546, 549.

(*s*) *Rex* v. *Benchers of Gray's Inn*, 1 Dougl. 353; *Boreman's* Case, Styles, 457; Vin. Abr. Mandamus (G), pl. 3. *Ante*, p. 33.

(*t*) *Rex* v. *Benchers of Lincoln's Inn*, 4 Barn. & Cr. 855; *S. C.* 7 Dowl. & R. 351. See 6th Report of Common Law Commissioners, 13th March, 1834, on Admissions of Law Students and Calls to the Bar.

A mandamus does not lie to the Archbishop of *Canterbury to* issue his fiat to the proper officer, &c., for the admission of a doctor of civil law, graduated at *Cambridge*, as an advocate of the Court of Arches (*u*).

A mandamus does not lie to the College of Physicians, commanding them to examine a doctor of physic, who has been licensed in order to his being admitted a fellow of that college (*v*); nor to restore a fellow of that college (*w*).

The charter of the College of Surgeons in *Ireland* directs the censors, &c. upon request to examine every person who shall have served an apprenticeship of five years to any regularly educated surgeon. The censors, &c. having refused to examine a candidate, upon the ground that the person to whom he served his apprenticeship was not a regularly educated surgeon, as he had only received a diploma from the College of *Glasgow*, and had kept an apothecary's shop, the court refused to grant a mandamus to compel the examination of the candidate, the censors, &c. not having acted capriciously, partially, or on false principles in his rejection (*x*).

In one case, the court refused a mandamus to restore a fellow of a college; but by consent granted a prohibition to try in whom the right of visitation was vested (*y*). The party, against whom the visitor's sentence has been executed, may have a remedy by ejectment (*z*); or he may, it is said, maintain a action for damages against the visitor (*a*).

When the visitor has pronounced a sentence, which by the statutes of the college a particular officer is to execute, a mandamus will not lie to compel such officer to do his duty, because it would interfere with the privilege of the visitor, who has power to direct the execution of the sentence by the

(*u*) *Rex* v. *Archbishop of Canterbury*, 8 East, 213.

(*v*) *Rex* v. *College of Physicians*, 7 T. R. 282. See 4 B. & C. 859; 7 Dowl. & R. 364.

(*w*) Dr. *Goddard's* Case, Lev. 19; *S. C.* 2 Show. 178. See 12 Mod. 666; Vin. Abr. Mandamus (B), pl. 2.

(*x*) *Rex* v. *The Royal College of Surgeons in Ireland*, 1 Hudson & Brooke, 475.

(*y*) *Broadoak's* Case, cited 1 Wils. 209; 1 W. Bl. 25, 58.

(*z*) Per Lee, C. J., 1 Wils. 209.

(*a*) 1 Ves. sen. 470.

proper person; but it seems doubtful whether the court will compel the visitor where he refuses to execute the sentence (*b*).

A mandamus was directed to Dr. *Walker*, vice master of *Trinity College*, in *Cambridge*, reciting the statutes, which ordained, that in case the master of the said college should at any time be examined before the visitor, the Bishop of *Ely*, and be lawfully convicted before him of dilapidation of the goods of the college, or violation of the statutes, he should, without delay, be deprived of the office of master of the said college, and that without appeal; and that the Bishop of *Ely*, as visitor, had adjudged that the master of the college had been guilty of dilapidation and violation of the statutes, and thereby incurred the penalty of the deprivation of his office; and that it was the duty of the vice master to execute the sentence, by depriving the master of his office, which the vice master refused to do; and therefore the writ commanded him, without delay, to deprive the master of his office, or to show cause to the contrary. The vice master returned, that the statute appointing the Bishop of *Ely* visitor, was void; and that the college, being of royal foundation, the king only was visitor. Lord *Hardwicke*, C. J., said, that the writ and return aimed at two things, which the court could not do; first, to aid the jurisdiction of the Bishop of *Ely* as visitor; secondly, to determine that the king was general visitor. But the writ destroyed itself by suggesting, that the bishop was visitor of the college; and if so, he might visit, and remove or punish the vice master, and the court could do no more: and, on the contrary, if the king was visitor, as the return suggested, application might be made to him to visit. The court quashed the writ of mandamus, intending it to be understood that they had not thereby determined whether the king or the bishop was general visitor (*c*).

The court refused to grant a rule for a mandamus, calling upon the trustees of the *Rugby* Charity, which was incorporated by stat. 17 George III. c. 71, to increase the weekly

(*b*) *Rex* v. *Bishop of Ely*, Andr. 176.

(*c*) Dr. *Walker's* Case, Cases Temp. Hardwicke, 212.

allowance to claimants on the funds, the trustees, it was alleged, having a large surplus fund applicable to the purposes of the charity, although the applicants were of an advanced age, and would probably be dead before relief could be obtained in Chancery (*d*).

A vestry having by a show of hands passed a resolution, directing an illegal application of some charitable funds, and a poll having been demanded of the person presiding at the vestry, and not granted, the court refused a rule for a mandamus to compel such person to grant a poll (*e*).

In order to support a return to a mandamus, it is not necessary that every part of it should be good; it is sufficient, if on the whole it discloses a fair legal reason why the mandamus should not be obeyed (*f*). Wherever there appears to be a general visitor, the common law courts will not interfere; yet as this is in the nature of a plea to the jurisdiction, it must appear on the return. The court will not supersede the writ of mandamus on an affidavit of the fact; it must appear by matter of record, which the party may contest (*g*).

It seems that a college may return generally that there is a visitor, without stating that by the statutes he has power to decide the particular matter in dispute; for it is incident to his office to determine all grievances which come before him (*h*).

Although Lord *Hardwicke* held that the bare averment of there being a visitor was not sufficient to exclude the jurisdiction of the court; but the extent of his authority must appear, that the court may be satisfied that he can do complete justice, otherwise a mandamus will be issued (*i*).

(*d*) *Ex parte the Trustees of Rugby Charity*, 9 Dowl. & Ryl. 214.

(*e*) *Rex* v. *the Churchwardens of St. Saviour's, Southwark*, 1 Ad. & Ellis, 380.

(*f*) *Rex* v. *Archbishop of York*, 6 T. R. 493, 495.

(*g*) *Rex* v. *Dr. Whaley, Master of Peterhouse College, Cambridge*, E. 13 George II. 34, MS. Serj. Hill, p. 325; 2 Selw. N. P. p. 1016, 4th ed.; Str. 1139.

(*h*) *Rex* v. *All Souls, Oxford*, Skinn. 13; Sir T. Jones, 174, cited 3 Atk. 663.

(*i*) *Rex* v. *Bland*, cited 1 Ves. sen. 474.

As a visitor may determine a grievance which happened in his predecessor's time, it is not necessary to state that it arose during the time of the present visitor (*k*).

On a mandamus to admit a scholar to *St. John's College, Oxford,* nominated by the Mayor of *Bristol,* to whom the right *pro hâc vice* belonged, the substance of the return was, that the college was founded by Sir Thomas White; that the Bishop of *Winchester* for the time being was the *local visitor;* that after the mayor's nomination of the scholar, the president of the college and ten fellows assembled to consider his qualifications, and that upon proof it was their opinion, that he had committed several facts *inconsistent with good manners;* he was therefore refused as incapable, &c. The better opinion was, that such return was too general, for there was no particular fact returned, so that it was impossible to try the truth of it in a collateral action (*l*).

On a mandamus to restore a party to his fellowship of *Christ College,* in *Cambridge,* the master and fellows returned, that if any fellow of the college be peccant, he shall be corrected by the master and dean; and if he find himself aggrieved, he may appeal to the chancellor of the university, and to two senior doctors: it was adjudged that the mandamus did not lie, but that the party ought to appeal to the visitor (*m*).

A return to a mandamus to restore a schoolmaster of a school, who has been removed for not taking oaths, ought to state that he has not taken the oaths of allegiance, abjuration and supremacy, or the oaths required to be taken by a schoolmaster (*n*).

Where it does not appear whether there is a visitor or not, the Court of King's Bench will grant a rule to show cause on an application for a mandamus; but when it appears that there is a visitor, the court will not interfere (*o*).

(*k*) *Rex* v. *All Souls, Oxford,* Skinn. 13.

(*l*) *Rex* v. *St. John's College, Oxford,* 4 Mod. 368. *Ante,* p. 364.

(*m*) Dr. *Widdrington's* Case, Sir T. Raym. 31; 1 Lev. 23.

(*n*) *Rex* v. *Bailiffs of Morpeth,* Str. 58.

(*o*) *Rex* v. *Bishop of Chester,* 1 Wils. 209; *Rex* v. *University of Cambridge,* Str. 557.

On a mandamus directed to the chancellor, masters, and scholars of the University of *Cambridge*, commanding them to restore Dr. *Bentley* to his academical degrees, they returned that the congregation, or the Vice Chancellor's Court, had power to deprive any member for contumacy; and that Dr. *Bentley* had been guilty of a contempt in speaking opprobrious words, for which he had been deprived; but it was not stated that they had a visitor, or that the party had been summoned. It was held that the degradation could not be supported, because the party had not been summoned; and the court granted a peremptory mandamus, on the ground that the principles of all law had been violated by condemning the party without a hearing (*n*).

A return to a mandamus to restore a parish clerk was held insufficient, because it did not state that the party had been summoned to answer the charge before he was removed (*o*).

Masters of grammar-schools must be licensed by the ordinary, who may examine the party applying for a license as to his learning, morality and religion; therefore it is a good return to a mandamus (to the ordinary to grant a license to a schoolmaster), to state that he had suspended granting his license until the party would submit himself to be examined touching his sufficiency in learning (*p*).

The statute 9 Anne, c. 20, requires a return to be made to the first writ of mandamus, which return may be pleaded to or traversed by the prosecutor, and his antagonist may reply, take issue, or demur, and the same proceedings may be had as if an action on the case had been brought for a false return; and after judgment obtained, he shall have a peremptory writ of mandamus to compel his admission or restitution—which latter, in case of an action, is effected by a writ of restitution (*q*). By stat. 1 Will. IV. c. 21, s. 6, in all cases of application for any writ of mandamus whatsoever the costs of such application, whether the writ shall be granted or refused, and also

(*n*) *Rex* v. *University of Cambridge*, 2 Ld. Raym. 1334; *S. C.* 8 Mod. 148; Fortesc. 202; Str. 557. See 6 T. R. 107; *ante*, p. 365.

(*o*) *Rex* v. *Gaskin*, 8 T. R. 209.

(*p*) *Rex* v. *The Archbishop of York*, 6 Term. Rep. 490.

(*q*) 11 Rep. 79; 3 Bl. Comm. 265.

the costs of the writ (if the same shall be issued and obeyed), shall be in the discretion of the court; which is thereby empowered to direct by whom and to whom the same shall be paid. By 1 & 2 Will. IV. c. 58, s. 8, the operation of that act (the Interpleader Act) is to extend to applications for writs of mandamus.

SECTION V.

Of Proceedings by Information.

1. *Of the Attorney General acting on behalf of the Crown in Charities.*
2. *When the Court of Chancery has no Jurisdiction*, p. 408.
3. *When the Attorney General is a necessary Party*, p. 411.
4. *Protestant Dissenters may proceed by Information—when, and when not*, p. 415.
5. *Of Informations respecting Funds applicable to Public Purposes*, p. 420.
6. *Of the Relator*, p. 424.
7. *The Attorney General may proceed without a Relator*, p. 428.
8. *Of Parties to Informations*, p. 430.
9. *Directions for establishing Charities will be given, notwithstanding Informality in Information*, p. 443.
10. *Plea, Demurrer, Multifariousness*, p. 445.
11. *Of the Accounts which will be directed of Charity Estates*, p. 454.
12. *Of Costs relative to Charities*, p. 467.

1. *Of the Attorney General acting on behalf of the crown in charities.*] It appears, by a preceding part of this

work (*r*), that the king has, by his prerogative, the general superintendence of charities.

The right of the attorney general to file an information is founded on the prerogative of the crown, as *parens patriæ*, through the medium of its proper officer, to call upon the several courts of justice, according to the nature of their several jurisdictions, to see that justice is administered to such subjects as are incompetent to act for themselves, as in the instance of charities and other cases. The king is entrusted by the constitution, and entrusts the attorney general, who is only attorney to the king, and stands in the same relation to him as every other attorney does to his employer, although by degrees he has attained high rank in the law (*s*). Lord *Eldon* said, the attorney general is an officer of the crown, and in that sense only the officer of the public (*t*).

Where the attorney general is personally a defendant, or out of the realm, or under a disability from sickness, or where the office of attorney general is vacant, the authority of the attorney general devolves upon the solicitor general; and several precedents have been found of informations filed by the solicitor general during vacancies in the office of attorney general (*u*).

When the attorney general sues for a general public purpose, the crown is no further concerned; but if any private right of the king (as to dispose of a surplus by sign manual) comes in question in such a suit, then the king, as an individual, must be represented by the solicitor general, who may be made a defendant, for the purpose of supporting the right of the crown (*v*).

So where a bill and information were filed for directions as to the application and future letting of lands given for charitable uses, but a small portion of the rents was directed to

(*r*) *Ante*, p. 269.

(*s*) Wilmot's Notes, 328.

(*t*) 1 Swanst. 294.

(*u*) *Rex* v. *Wilkes*, 4 Burr. 2554-5; *S. C.* Wilmot's Notes, 329; 4 Br. P. C. 360, 2nd ed.; 2 Coll. Jur. 134.

(*v*) *Attorney General* v. *Mayor, &c. of Galway*, 1 Molloy, 106; *Attorney General* v. *Mayor of Bristol*, 2 Jac. & Walk. 309, 310; *S. C.* 3 Madd. 319.

be applied for a superstitious purpose, the information was ordered to stand over, in order that the solicitor general might be brought before the court to sustain the rights of the crown (*w*).

In a bill to establish a modus where the rectory was an eleemosynary foundation, of which the king was visitor, it was held that the attorney general was not a necessary party (*x*).

If a question as to the right of the crown to appoint by sign manual a fund given to superstitious uses, arises in a suit between individuals, the attorney general must be heard; and the cause will be ordered to stand over for the purpose of amending the pleadings, by making him a party (*y*).

Whenever the proceeding is by information in the common and ordinary way, the consent and authority of the attorney general is required throughout the proceedings, though he does not always act personally (*z*). If he happens to act in the Court of Chancery before the lord chancellor, of course the attorney general appears as counsel in the information. It is in the course of business to send a brief to him upon the subject: but if the proceeding is heard at the Rolls, where the attorney general does not always attend, he never interferes there; for the course then is to apply to the attorney general to know to whom he chose the brief should be delivered for the purpose of conducting a charity case, and even in a case where the attorney general is made defendant, which he may be in order to protect the charity, the attorney general always prepares an answer for that purpose by the hands of a person who acts as his assistant. Every attorney general names the person who is to be his assistant in the Court of Chancery, and in the Court of Exchequer also, for revenue purposes (*a*).

(*w*) *Attorney General* v. *Vivian*, 1 Russ. 226.

(*x*) 3 Anstr. 768. See *Attorney General* v. *Moses*, 2 Madd. 294.

(*y*) *De Themmines* v. *De Bonneval*, 5 Russ. 293.

(*z*) *Attorney General* v. *Hewitt*, 9 Ves. 232.

(*a*) *Corporation of Ludlow* v. *Greenhouse and others*, 1 Bligh. N. S. 65, 66. Where the attorney general practises in the common law

If there be an information on the part of the attorney general, he ought to be employed in it; and it has happened that an information has been stopped, because the attorney or solicitor general was not in it (*z*). The attorney general may appear against a petition under stat. 52 Geo. III. c. 101, although he has signed and allowed it (*a*).

In a reference to the master to approve of a scheme for the administration of a charitable fund, the registrar had drawn up the minutes of the decree in conformity with a regulation introduced by Sir *John Leach*, requiring the attorney general to attend before the master in every case of reference for the settlement of a scheme for the administration of a charity. The attorney general attends such a reference by counsel, which consequently considerably increases the expense of the inquiry. It appeared that the practice of the vice chancellor was, not to require the attendance of the attorney general, except when it was absolutely necessary. As the charity fund in this case did not much exceed £1100., Sir *C. Pepys*, M. R. on application, ordered the direction to be struck out of the minutes of the decree (*b*).

A suit in the equity side of the Court of Chancery on the behalf of a subject merely, is commenced by preferring a bill in the nature of a petition to the lord chancellor, lord keeper, or lords commissioners for the custody of the great seal; or to the king himself, in his Court of Chancery, in case the person holding the seal is a party, or the seal is in the king's hands. The plaintiff sets forth the circumstances of his case, praying such relief as he conceives himself to be entitled to, or requires; and also, process of *subpœna* against the defendant, to compel him to answer the charges in the

courts, he receives fees, with briefs in charity cases, as part of his official remuneration, generally without paying any attention to the briefs, except in important cases of compromise.

(*z*) *Attorney General* v. *Green*, 1 Jac. & Walk. 303, 305.

(*a*) *Corporation of Ludlow* v. *Greenhouse*, 1 Bligh, N. S. 17.

(*b*) *Attorney General* v. *The Haberdashers' Company*, 2 Mylne & Keen, 817.

bill (*c*). If the attorney general is made a defendant as an officer of the crown, the bill must pray, instead of the writ of *subpœna*, that he, being attended with a copy of the bill, may appear, and put in an answer (*d*).

The difference in form between an information and a bill, consists merely in offering the subject matter as the information of the officer in whose name it is exhibited, at the relation of the person who suggests the suit in those cases where a relator is named; and in stating the acts of the defendant to be injurious to the crown, or to those whose rights the crown thus endeavours to protect. When the pleading is at the same time an information and a bill, it is a compound of the forms used for each when separately exhibited (*e*).

The objects generally sought to be attained by proceedings in courts of equity respecting charities, are the appointment of new trustees—the discovery of the legal representatives of the original founder or of deceased trustees—the recovery of money and estates from wrongful possessors—the settlement of a scheme for the due application of the funds belonging to the charity—the setting aside fraudulent or improvident leases or contracts—the taking the accounts of trustees, and charging them with interest upon balances improperly held—the recovery of rent charges — and for establishing the rights of charities to the whole income of estates, instead of fixed payments out of them.

Informations respecting charities cannot be filed without the consent of the attorney general (*f*); and therefore, his *fiat* must be obtained both to an original and an amended

(*c*) 1 Newl. Ch. Pr. 51; Harr. Ch. 41.

(*d*) Redesdale's Pl. 38; 4th ed. See *Barclay* v. *Russell*, Dick. 729; *S. C.* 3 Ves. 424.

(*e*, Redesdale's Pl. 100, 4 ed.

(*f*) The fee for the *fiat* is £1 12*s.* 6*d.* A *caveat* may be entered at the attorney general's office against his granting his *fiat* to an information against particular parties, in which case, before the *fiat* is granted, the parties will be allowed to attend by counsel before the attorney general, in order to discuss the propriety of granting or witholding the *fiat*.

information, before it is filed; otherwise it will be ordered to be taken off the file.

The attorney general always requires the certificate of a barrister that the case is proper for his sanction. The documents sent to the attorney general, upon which he is to ground his *fiat*, are a copy of the information accompanied by the parchment engrossment, with a certificate of counsel, that it is proper for his sanction, and a certificate of the solicitor that the relators are of competency.

The practice is, for the attorney general to sign the original information on parchment; and when an information is amended, to sign the *draft* of the amendments, for the original record is not taken off the file. The attorney general's *fiat* is given almost as a matter of course upon reasonable suggestions.

An amendment to an information will not be permitted without the sanction of the attorney general; and an amended information, which had not been signed by him, was ordered on motion to be taken off the file (*g*).

So where an information had been stopped on the ground that the relators were insufficient persons, being paupers, and leave had been given to amend the information by adding the name of a new relator, such information was ordered to be taken off the file; because the amended information was filed without the sanction of the attorney general, who, at the time, was in *Scotland* (*h*).

A solicitor ought to have a special authority from his client for instituting a suit, although such authority needs not to be in writing (*i*).

In a recent case an issue was directed, to try whether the relator named in an information had given authority to the

(*g*) *Attorney General* v. *Fellows*, 1 Jac. & Walk. 254.

(*h*) *Attorney General* v. *Hesketh and the Churchwardens of St. Dunstan in the East*, V. C. 10 July, 1834; Reg. lib. A. 1833, fol. 1137.

(*i*) *Lord* v. *Kellett*, 2 Mylne & Keen, 1; *Wright* v. *Castle*, 3 Mer. 12; *Wilson* v. *Wilson*, 1 Jac. & W. 457. See *Anon.* 1 Salk. 86; *Hammond* v. *Thorpe*, 1 Cr. M. & Rosc. 64; *Dundas* v. *Dutens*, 1 Ves. Jun. 196; *Wade* v. *Stanley*, 1 Jac. & Walk. 674.

solicitor to file it, on the ground that, as his personal character was involved, a jury was the most proper tribunal for deciding the question. (*j*)

The proceedings on an information will not be stayed on the defendant's motion, on the ground of its having been filed, without the consent of one of the relators; though it may be a sufficient reason for striking out the name of such relator on his own application (*k*).

It is competent to the Court of Chancery to submit the consideration of an information to the attorney general, who frequently exercises a sort of equitable jurisdiction in the matter. Where a petition had been presented under the stat. 52 Geo. III. c. 101, and an information was afterwards filed, embracing the same or part of the same objects, it was referred by the court to the attorney general, to consider and certify which should proceed (*l*). Where, upon an account extending over an unusually long period of time, a large balance was found due from a corporation to a charity, the lord chancellor referred it to the attorney general to certify whether it would be proper, that the charity should accept a less sum, in lieu of the balance stated in the master's report, to which exceptions had been taken; and the attorney general having certified that it would be proper that the charity should accept a sum less than one-half of that balance, the corporation bearing their own costs of the suit, the certificate was confirmed, and a decree made accordingly (*m*). Where any arrangement takes place out of the master's office, to obviate the expense of going though voluminous accounts, there is a memorial presented to the attorney general, setting forth the terms on which it is contemplated the arrangement should take place.

(*j*) *Attorney General* v. *Skinners' Company*, Reg. lib. A. 1833, fol. 1301, affirmed on appeal by the Lord Chancellor, 18th March, 1835; who said, that he doubted whether the Attorney General would allow an information to proceed where the consent of the relator to the original information had not been obtained before the Attorney General's *fiat*.

(*k*) *Attorney General* v. *Norris*, Bunb. 258.

(*l*) *Attorney General* v. *Green*, 1 Jac. & Walk. 303.

(*m*) *Attorney General* v. *Mayor of Exeter*, 2 Russ. 362, 370.

The attorney general, upon this memorial, gives a summons for the parties to attend him. In complicated cases, counsel generally attend on both sides. If the attorney general thinks proper, he gives his *fiat* to the arrangement, and the court will, on application, afterwards confirm it, if recognised by the attorney general as a fit and proper case. After exceptions had been allowed to an answer to an information, the court being of opinion that the interrogatories were more extensive than the purposes of the suit required, referred it to the attorney general to consider what course ought to be taken with respect to the exceptions, and stayed all proceedings in the suit in the meantime (*n*). The attorney general having certified his opinion, that the defendants ought not to be required to put in a further answer to the said information as to eleven exceptions, such certificate was confirmed, with liberty for the informants to amend (*o*).

A compromise of a charity suit with the residuary legatee, appropriating part of the funds to the establishment of scholarships, or exhibitions for the study of the civil law, at *St. John's College, Oxford* (the only college which would accept the gift with the conditions annexed), connected by its foundation with the Merchant Taylors' Company, and giving the rest of the funds to the next of kin, was established by the decree of the court, where the attorney general's consent to the arrangement appeared (*p*). Sir *W. Grant*, M. R., who made this decree sanctioning the compromise, afterwards said (*q*), he had entertained doubts, if that decree were attacked, whether strong objections might not be made to it. But it was clear that when he sanctioned it, he understood all that had been done on the part and in the name of the attorney general was to stand, and nothing done by him was to be broken in upon; he being considered a competent party to all that had passed. "If (continued his honour) I had supposed, that by sanctioning this compromise I was to place

(*n*) *Attorney General* v. *Corporation of Carlisle*, 4 Sim. 275.

(*o*) *S. C.* Reg. lib. A. 1831, fol. 2624.

(*p*) *Andrew* v. *Merchant Taylors' Company*, 7 Ves. 223.

(*q*) *Andrew* v. *Trinity Hall*, 9 Ves. 532, 533.

third persons, who were not before the court, in a new situation, I would have heard their objections to the compromise; I would not have exposed them to a claim, without hearing them against the compromise. Perhaps they might have objected to the compromise, not only upon their own interests, but the want of right in the attorney general to give it up, upon the principle established in favour of the public. Without, however, meaning to give an opinion upon that, I should have heard their objections upon their own particular interest. I understand the next of kin did not acquire a right to the surplus, in consequence of any determination that as next of kin they were entitled, but purely by the compromise of a very doubtful and difficult question; and therefore succeeded only to his right, as far as the cause had proceeded at his instance."

The plaintiff, in the case of *Attorney General* v. *the Merchant Taylors' Company* (*r*), after the compromise, filed a bill, praying an account of the sums received by the defendants, in respect of the interest or profits made by the defendants, from the arrears of interest of the sum of 1,050*l.*, due upon the turnpike security of the testator, and for repayment of a legacy of 100*l.*, given to Trinity Hall. By the deed executed between the plaintiff and the Merchant Taylors' Company, it was declared that the company agreed to accept the sums therein mentioned, in lieu and full satisfaction of all their right and interest in the said funds, and in the said money due on the turnpike security; and they covenanted and agreed, that the residue of the funds, together with the 1,050*l.* due from the trustees of the turnpike, and all the right and title to the interest of that sum received by the defendants during the time they possessed the turnpike security, should be transferred and paid to the plaintiff. The bill further stated, that the plaintiff had lately, long after the answer put in on the original cause, discovered that the testator's executrix had paid to the defendants the legacy of 100*l.* and delivered the plate; and that the defendants had made

(*r*) 7 Ves. 125.

considerable interest or advantage of the interest received by them upon the turnpike security; and charged that the said legacies were bequeathed under the expectation that the defendants would perform the trusts of the will; and having refused and disappointed the will to the utmost of their power, they were incapable of taking any benefit under it; and that, as the intention of the testator was, that the 1,050*l.* should accumulate, it was their duty to make it productive.

It was held that although the next of kin took every thing not specifically appropriated by the agreement, yet, as to the demand against the college, it had already been ascertained and liquidated. It was not an open demand, nor one to be instituted as new; as if nothing had passed relative to it, or as if what had passed was to be considered as having taken place between incompetent parties. The next of kin were completely bound by every thing the attorney general was bound by, and he never could have affected the decree for an account. The bill was dismissed, but without costs (*s*).

In the *Attorney General* v. *Landerfield* (*t*), an agreement between the next of kin of a testator and the governors of *St. Bartholomew's Hospital*, for dividing the property in certain proportions between them, in order to avoid questions on the statute of mortmain, was established by a decree of the court; but the court will not now act on an award in a charity cause without the consent of the attorney general, or a reference to the master, to see whether it is for the benefit of the charity; but where, with the consent of the attorney general, a motion was made by the relators and the defendants for a reference to an individual, it was directed that he should not be called arbitrator: for, though causes of this description had been often referred to particular persons, it had not been made to them as arbitrators (*u*).

In a suit by the attorney general for relief, on an imputed breach of trust as to property belonging to a charity, the court will allow a reference on the request of the defendants with the attorney general's consent, and the cause may be

(*s*) *Andrew* v. *Trinity Hall, Cambridge*, 9 Ves. 525.

(*t*) 9 Mod. 286, 5th ed.

(*u*) *Attorney General* v. *Hewitt*, 9 Ves. 232.

ordered to stand over, for the purpose of ascertaining whether the attorney general would consent to a reference; but it would be refused where the question in the cause turns on the construction of a will (*v*).

The jurisdiction of the Court of Chancery to give effect to an award confirmed by the decree of the court, in the case of a charity, was considered doubtful; but the renewal of a lease upon the terms of an award having been twice directed by the court, was again enforced (*w*).

2. *When the Court of Chancery has no jurisdiction.*] We have already seen that the Court of Chancery has no jurisdiction over charities established by charter, if the visitors or governors appointed to regulate it are not entrusted with the management of the revenues; but that the court has jurisdiction over governors, so far as they are the trustees of the revenues (*x*).

The cases in which the governors or visitors are said

(*v*) *Attorney General* v. *Fea*, 4 Madd. 274.

(*w*) *Attorney General* v. *Clements*, Turn. & Russ. 58. See *Attorney General* v. *Cholmley*, 2 Eden, C. C. 304; Ambl. 510.

(*x*) See *ante*, 292, 296; 334, 336.

On an information, at the relation of the brethren and sisters of *St. Catherine's Hospital*, praying to be quieted and relieved. It appeared that the hospital was founded by Queen *Eleanor*, who made rules for its government, and appointed a certain allowance for the brothers and sisters. The revenues having much increased, they insisted that their allowances ought to be so too; and complained of several acts of the master in renewing leases, &c. without the consent of the brothers, and suspending them. The master pleaded that the Queens of *England* were patrons and visitors of the hospital; and showed, that it having once vested in a queen consort, who afterwards became a dowager, the right remained in her, and did not go over to the queen consort; and that where there was no queen, the kings had visited; and insisted that the Court of Chancery had no jurisdiction, but that the visitation belonged to the queen dowager. The lord keeper adopted the rule established in *Philips* v. *Bury* (Skinn. 447), that where once a visitor had given judgment, no court could interfere; but thought that this case had nothing to do with the judgment of the visitor, but to assist it; and that there was no pretence for removing the master, nor controverting the mismanagement of the hospital.—*Attorney General* v. *Sir J. Butler*, Skinn. 644.

not to be amenable to the Court of Chancery, must be confined to such governors as have the power of government only, and not extended to those who have the legal estate, and are entrusted with the receipt of the rents and profits: for it would be of the most pernicious consequence imaginable that any person, intrusted with the receipt of rents and profits of a charity, should be unaccountable for their receipts and for a gross misapplication (*y*).

Where the governors of a charity are also visitors, they are subject and accountable to the Court of Chancery, so far as relates to the estates of the charity (*z*).

The visitatorial power may with propriety be called upon to interpose where there is any substantial deviation from the principle and purpose of a charitable institution. But where an information represents the course of education and internal discipline of the school as not entirely agreeable to the rules laid down by the founder, but the governors are expressly authorized to alter those rules; such alterations as have been long known and acquiesced in will be presumed to have been made by their authority, though the precise order for it does not appear. Whether this or that book is to be read in a particular form—whether the boys are to go to school at this or that hour, and the like—will be left to the governors and masters to determine (*a*). So where the visitor has generally been one of the governors who have acted as trustees in the receipt of the rents and profits of the charity, the court has jurisdiction over them (*b*).

Where a party in a plea to a suit denies the jurisdiction of the court, on the ground that there is a visitor, it must be clearly shown that a visitor is appointed by the donor, and that his

(*y*) The Case of *Sutton Colefield*, Duke, 68 (642); *Hynshaw* v. *The Mayor, &c. of Morpeth*, Duke, 69, (242); *Eden* v. *Foster*, 2 P. Wms. 326; *Attorney General* v. *Corporation of Bedford*, 2 Ves. sen. 505.

(*z*) *Sutton Colefield*, Duke, 68, (642); *Attorney General* v. *Lock*, 3 Atk. 165.

(*a*) *Attorney General* v. *Earl of Clarendon*, 17 Ves. 507.

(*b*) *Attorney General* v. *Dixie*, 13 Ves. 539.

power extends to the subject matter in dispute (*c*), and relators, in answer to such a plea, will be allowed to state other statutes for the purpose of contradicting the plea (*d*).

Pending an information respecting a charity, the surplus rents cannot be applied by an individual, nor can governors be regularly appointed without the leave of the court, and governors so elected will be removed by the court (*e*).

Where trustees of a charity have discretionary powers, the court will not interpose, unless they act corruptly. Thus where lands were vested in the Governors of Harrow School, upon trust to employ all the profits yearly towards repairing the common highway from *Edgware* to *London*, when, and as often, and in such manner as the governors should think fit; and if thereafter it should happen that the said highway should be sufficiently amended, or not require the whole profits to be laid out, as often as that should happen, the governors should lay out on the road from *Harrow* to *London*, the whole or so much as should remain, after repairing the *Edgware* road: the *Edgware* road having the assistance of two turnpike acts, and the *Harrow* road being in very bad repair, an information was filed, on the ground that the profits expended on the *Harrow* road ought to have been laid out on the *Edgware*; but Lord *Hardwicke* refused to interfere, as the expenditure was left to the discretion of the trustees, who had not acted partially and corruptly (*f*).

An information in the name of the attorney general cannot be sustained, where the trust is of a private nature, not coming within the denomination of a charitable use or trust (*g*).

Where a school-house had been erected on the waste, by the voluntary contributions of the inhabitants; and the lord of the manor afterwards conveyed the land to some of the

(*c*) *Green* v. *Rutherforth*, 1 Ves. sen. 470. See *ante*, p. 395.

(*d*) *Attorney General* v. *Talbot*, 3 Atk. 662.

(*e*) *Attorney General* v. *Dixie*, 13 Ves. 535—538.

(*f*) *Attorney General* v. *Governors of Harrow School*, 2 Ves. sen. 551.

(*g*) *Attorney General* v. *Whorwood*, 1 Ves. sen. 534, *ante*, p. 87. *Attorney General* v. *Brereton*, 2 Ves. sen. 426; *Attorney General* v. *Middleton*, Ibid. 328.

principal inhabitants, to the intent that they might have a school: on a dispute between the surviving trustees and the inhabitants, respecting the right of nominating the schoolmaster, it was held, that as it was not a free school, nor a charity within the 43 Eliz. c. 4, that the inhabitants had no right to sue in the name of the attorney general (*h*).

It seems that parishioners and inhabitants, having the right to nominate a curate, cannot sue in the attorney general's name, merely with respect to the right of election; but must proceed by bill (*i*).

3. *When the attorney general is a necessary party.*] The attorney general is a necessary party to informations respecting charities, because the king, as *parens patriæ*, superintends the administration of all charities, and acts by the attorney general, who is his proper officer in this respect (*k*).

Where a testator bequeathed the sum of 5,000*l.* in trust, to be transferred into the names of the officers of an academical institution established at *York*, chiefly for the instruction of dissenting ministers, who were to stand possessed thereof upon certain trusts therein mentioned; and the testator empowered such officers, within twelve months, to make such further rules for the distribution of the interest, and for perpetuating the trusts as they should judge necessary. On a bill by the persons who held the offices mentioned in the will at the testator's death against his executors for payment of the legacy, who submitted that the attorney general ought to be a party, the court would not allow the plaintiff to receive the legacy, but required the creation of a proper and permanent trust, and directed the cause to stand over, with leave to make the attorney general a party, in order that he might attend before the master when the case was sent to him to settle the scheme (*l*).

(*h*) *Attorney General* v. *Hewer*, 2 Vern. 387.

(*i*) *Attorney General* v. *Parker*, 1 Ves. sen. 43; *S. C.* 3 Atk. 576. See 10 Ves. 335; 14 Ves. 7; *Davis* v. *Jenkins*, 3 Ves. & B. 154.

(*k*) *Wellbeloved* v. *Jones*, 1 Sim. & Stu. 43.

(*l*) *Ibid.* 40.

Where it appeared, in a suit by an heir at law claiming a resulting trust, that there was a disposition in favour of a charity, the bill was ordered to be amended, by making the attorney general a party on behalf of the charity (*m*).

The attorney general should be made a defendant in a suit by the next of kin of a testator, to set aside a gift within the statute 9 George II. c. 36 (*n*).

Where a decree in a cause had been made on bill and answer, and on appeal, the Lord *Chancellor* was of opinion, that the attorney general ought to have been a party to the suit, the petition of appeal was ordered to stand over, with liberty for the plaintiffs to amend their bill, by making the same a bill and information, or an information only, as they should be advised (*o*).

But it has been held not to be necessary that the attorney general should be a party where a legacy is given to the treasurer, or other officer of some established charitable institution, to become a part of the general funds of that institution; and such exception is reasonable, for the attorney general can have no interference with the distribution of their general funds (*p*).

It was held that the attorney general was not a necessary party to a suit between the members of a voluntary society, formed for the purpose of providing, by a weekly subscription, for such of the members as should become necessitous, and their widows, because it was in the nature of a private charity (*q*).

So in a bill for an account, where a legacy was given to a charity, it was referred to the master to take the accounts, although the attorney general was not a party (*r*).

Where a legacy of stock was bequeathed to the rector, churchwardens and overseers of the poor of a parish, upon

(*m*) *Cook* v. *Duckenfield*, 2 Atk. 563.

(*n*) *Kirkbank* v. *Hudson and the Attorney General*, 7 Price, 212.

(*o*) *President of Magdalen College, Oxford* v. *Sibthorp*, 1 Russ. 154.

(*p*) *Wellbeloved* v. *Jones*, 1 Sim. & Stu. 40.

(*q*) *Anon.* 3 Atk. 277.

(*r*) *Chitty* v. *Parker*, 4 Br. C. C. 38.

trust to lay out and dispose of the interest and dividends in bread to be given for ever annually to the poorest parishioners, at the discretion of the rector, churchwardens and overseers for the time being, payment of the legacy was decreed on a bill filed by them, although it was objected that an information by the attorney general was necessary, and he had accordingly been made a defendant (*s*).

By letters patent 19 James I., a rectory, with the appurtenances was granted to the Dean and Chapter of *York* and their successors, for the maintenance of a grammar-school. In 1712, an arrangement was entered into, between the dean and chapter, and their lessee of the rectory, to take a perpetual composition, in lieu of the tithes of that district, and such arrangement was carried into effect by deeds of covenant, executed by the dean and chapter and their lessee and the lord of the manor, the latter of whom granted a perpetual rent charge, to the amount of the compensation, out of his estates. This rent or composition was received by the lessee of the dean and chapter for upwards of a century, when the latter, having the rectory in their own hands, refused to accept it, and filed their bill for tithes. The court held, that as the covenant was actually void, within the stat. 13 Eliz. c. 10 (restraining the alienation of ecclesiastical possessions), and there was no existing lease that they were entitled to recover the tithes, by a bill to which the attorney general was not a party.

But it seems to have been considered by the court, that if the transaction in 1712 had been so far valid that it could only have been set aside as a breach of trust; that then no decree could have been made on the bill, but that an information must have been filed at the suit of the attorney general, who can alone exercise the prerogative of examining the conduct of trustees for charitable purposes, and upon whose application alone the court will interfere in cases of breaches of trust with respect to charity estates (*t*).

(*s*) *Mayor* v. *Nixon*, 2 Younge & Jerv. 60.

(*t*) *Dean and Chapter of York* v. *Middleburgh*, 2 Younge & Jerv. 213.

It was decided that the court may give directions for the management of a charity, where the donor has appointed trustees, in a suit to which the attorney general is not a party. On a bill brought by some of the trustees against other trustees, and several *cestuis que* trusts, to establish a will and to perform several trusts, some of them relating to charities, an objection was made for want of parties: because there were several charities given by the will to persons uncertain, not capable of suing or being sued, who were not before the court; therefore the attorney general, on their behalf, ought to have been made a defendant, to take care of these charities; for if a decree should be made in this cause it would not be final, but the attorney general might afterwards bring an information on behalf of these charities, and set aside this decree; and therefore he ought to have been a party. *Per Parker*, C.—"I think, in this case, the attorney general need not be made a defendant. It is true, where a bill is brought on behalf of such a charity to establish it, it must be in the name of the attorney general *ex necessitate rei*, because there are no certain persons entitled to it who can sue in their own names; but in this case there is no such necessity, for some of the trustees of the charity are made defendants, and there may be a decree to compel an execution of the trusts in the will relating to those charities; and if there should be any collusion between the parties in relation to the charity, it is true the attorney general, notwithstanding a decree, may bring an information to establish the charity and set aside the decree; and I think he may do the same thing (though he were made a defendant), in case of collusion between the parties." But he seemed to admit, that where an estate is devised to trustees for charities to persons certain, who are capable to sue or be sued, such persons ought to be made defendants as well as other *cestuis que trusts* (*t*). The court would not treat an old decree for the alienation of a charity estate as a nullity, on account of the attorney general not having been a party where

(*t*) *Monill* v. *Lawson*, Vin. Abr. tit. Ch. Uses, H. pl. 11.

the information did not seek to impeach the decree on that ground (*u*).

The court will grant an injunction wherever a case is made out, either by positive or probable evidence, that the trustees of a charity are acting in a manner inconsistent with the trust, and are either doing, or about to do, what will be detrimental to the charity; and which, when done, cannot be undone (*v*).

Where charity lands have been occupied with other lands, and cannot be pointed out or ascertained amicably, a commission will be issued to ascertain what lands belong to the charity and what do not; and if that cannot be ascertained, the value of the land that did belong to the charity must be ascertained (*w*).

On setting aside a lease of charity lands, a commission was granted for distinguishing them from the lands of the lessee (*x*).

It is said that where a college upon a private foundation refuse a copy of their statutes upon the demand of a person claiming to be admitted a fellow, a bill of discovery will lie in equity (*y*).

4. *Protestant dissenters may proceed by information, when and when not.*] Every class of Christian dissenters, since the Act of Toleration, 1 Will. & Mary, c. 18 (*z*), is entitled to the aid and assistance of a court of equity, in carrying into execution trusts relating to charities, and for the support of their own worship and religion, as much as any other class of persons (*a*).

(*u*) *Attorney General* v. *Warren*, 2 Swanst. 311.

(*v*) *Attorney General* v. *Governors of Foundling Hospital*, 2 Ves. jun. 49. See *Reeve* v. *Parkins*, 2 Jac. & Walk. 390; *Pearce* v. *Piper*, 17 Ves. 1.

(*w*) *Attorney General* v. *Fullerton*, 2 Ves. & Beames, 263. *Attorney General* v. *Bowyer*, 5 Ves. 300. See stat. 2 & 3 Will. IV. c. 80, to authorise the identifying of lands and other possessions of certain ecclesiastical and collegiate corporations.

(*x*) *Reresby* v. *Farrer*, 2 Vern. 414.

(*y*) *Rex* v. *Archbishop of Canterbury*, Ridgway's Cases, temp. Hardwicke; *S. C.* 2 Barnard. 437.

(*z*) *Ante*, pp. 101—105.

(*a*) *Attorney General* v. *Cock*, 2 Ves. sen. 276.

It is now clearly settled that the Court of Chancery is bound to administer, with all possible expedition, for the benefit of a protestant dissenting congregation, a trust created for the application of certain trust property for the maintenance of a preacher to such a congregation; and where a trust, in the nature of a charity for religious purposes, clearly appears, and the court can see any way of deciding the points at issue, it will not allow the parties to go to a trial at law, but will put the matter in such a course as to save the expense of such a proceeding; and if it be clear upon the bill and answer that a certain portion of the legal estate is vested in the plaintiffs, and another portion in the defendants, it is within the jurisdiction of the court to put the parties exactly in the same condition as to the point at issue, as if there had been a trial, judgment, and execution at law (*b*).

There are several cases in which protestant dissenters have been permitted to sue by information in the name of the attorney general, where the gift or devise is clear of the Statute of Mortmain (*c*).

Where a testatrix bequeathed a legacy to be put out on good security by her executors, the interest to be paid annually to the Rev. J. B., the minister of a congregation of Calvinistic independents, and to his successors, so long as he and his successors should teach in the town of W. the gospel of Christ, under the name of orthodoxy; an information and bill by the succeeding minister, who preached the same doctrines, and by a member of the congregation, were sustained, in the name of the attorney general, for the investment of the legacy and payment of the interest to the ministers (*d*).

It does not appear to be determined what species of institution necessarily requires an information, and what may be

(*b*) *Attorney General* v. *Pearson*, 3 Mer. 396, 397.

(*c*) *Attorney General* v. *Fowler*, 15 Ves. 85; *Attorney General* v. *Lord Dudley*, Coop. C. C. 146.

(*d*) *Attorney General* v. *Molland*, 1 Younge, 562.

the subject of a decree without the interference of the attorney general.

Where it appeared that in 1749 several persons, being "protestant dissenters," had purchased jointly a piece of ground for the purpose of erecting a chapel, which was afterwards built for the use of the purchasers and others, who contributed to the building, and erected pews at their own expense; that the pew owners were the only persons beneficially interested in the land and chapel; and such pew owners and the rest of the congregation from time to time appointed a minister, to whom a salary was paid, raised partly amongst themselves and partly by the interest of legacies; the pew owners regulating the chapel, directing repairs, &c. The heir of the survivor of the persons to whom the land was conveyed in 1749, having set up a claim to the chapel and land as his own private property, appointed an improper person as minister, placed a lock on the door of the chapel, and threatened to bring an action for removing it. A bill was filed by some of the pew owners of the chapel, and the minister appointed by them, and the congregation, charging that the defendant was a mere trustee, and praying a discovery and delivery of the deeds; that new trustees might be appointed; that the defendant might be decreed to execute a proper conveyance to them, and might be restrained by injunction from commencing any action against the plaintiffs, or any owners or proprietors of pews in the chapel, and from interfering in the management, or interrupting divine service. An injunction having been granted, it was contended, on a motion to dissolve it, that the suit ought to have been by information. Lord *Eldon* said, "the question what is that species of suit, that must be maintained by information and cannot proceed upon a bill, is a point of great difficulty. It is not true, as has been contended, that when there is a public right, the suit must be by information." His lordship directed an inquiry as to the right to propose new trustees, and to elect a minister; and seems to have held, that the matter in dispute might be regulated by

a bill only, because the charity had no fixed revenue, but depended on voluntary contributions (*e*).

Where it appeared that a part of the trustees of a chapel were acting, or had been acting, and might fairly be understood as meaning again to act in a manner inconsistent with their trust, regarding the ecclesiastical concerns of a chapel; an injunction was granted, upon affidavit before answer, on a bill filed by two of the trustees, one of whom was an elder of the congregation, to restrain the other trustees of a chapel erected by a Presbyterian congregation for religious worship according to the usages, discipline, and doctrine of the church of *Scotland*, from electing as minister, a person not duly licensed by that church; but an injunction to restrain them from allowing persons not so licensed to officiate, and from preventing persons so licensed and otherwise duly authorised from officiating during the intermediate period prior to such election, was refused (*f*).

Three objections were afterwards taken to the frame of the suit in this case—first, that the property in question was of such species, that a suit in respect of it ought to have been by way of information and not by bill—secondly, that even supposing the parties to have been entitled to proceed by way of bill, the attorney general was a necessary party to the suit —and thirdly, that if the parties were entitled to sue in their own names, they ought to have sued on behalf of themselves and the other persons interested in the property. Sir *C. C. Pepys*, M. R., decided, that as the chapel had been built by the voluntary subscription of persons professing particular doctrines, and was supported by them, it was a species of property in respect of which the persons interested in it had a right to proceed in the Court of Chancery by way of bill; and that the attorney general was not a necessary party to the suit. But as the bill had been filed by trustees who had the management of the chapel, in whom the legal estate was

(*e*) *Davis* v. *Jenkins*, 3 Ves. & B. 154.

(*f*) *Milligan* v. *Mitchell*, 1 Mylne & Keen, 446.

not vested against other trustees, one of whom had the legal estate, without making the persons beneficially interested parties, the suit was held on that account to be defective for want of parties; and it was ordered, that the plaintiffs should be at liberty to amend their original bill within three weeks, for the purpose of adding parties, as they might be advised, or of showing cause why they were unable to bring all proper parties before the court (*g*).

Whilst a suit is pending for the regulation of a dissenting meeting house, it is the practice of the court, where the minister in possession is performing his duty and preaching the doctrines which were intended, to continue him whether he was duly appointed or not, the first point being to have the service performed; and the court will order the payment of his salary (*h*).

Where a dissenting chapel is supported by voluntary contributions, and the rents of the pews are appropriated to the support of the minister, the court will not interfere in the appointment of a receiver as to the voluntary contributions, the amount and application of which depends entirely upon the donors; although, if the nature of the case required it, one might be appointed as to the pew rents (*i*).

If a deed of trust for establishing a meeting-house contains no directions as to the mode of electing ministers, nor as to the duration of their office when elected, nor any provision for the minister, who depends entirely on the voluntary contributions of the members of the congregation, the court has no jurisdiction to interfere to prevent the removal of the minister (*k*).

On an application for an injunction to restrain an individual who had been elected minister of a chapel, Lord *Eldon* said, this court has nothing to do with the voluntary subscriptions

(*g*) *Milligan* v. *Mitchell*, Reg. lib. B. 1834, fol. 887.

(*h*) *Foley* v. *Wontner*. 2 Jac. & Walk. 247. See *Attorney General* v. *Hartley*, 2 Jac. & Walk. 375.

(*i*) *Attorney General* v. *Fowler*, 15 Ves. 85. See *Ex parte Pearson*, 6 Price, 214.

(*k*) *Porter* v. *Clarke*, 2 Sim. 520.

which may be paid to-day and withheld to-morrow; its jurisdiction is founded only on its right to declare the trust of the chapel, and how the chapel is to be used. The trust of the chapel is, however, connected with the consideration of the exercise of a spiritual jurisdiction; and the property being for the use of a Scotch congregation, we are led to the inquiry how the ministers of such congregations are usually appointed. We have to do, therefore, only with the fact, whether the minister has been appointed minister by the exercise of that spiritual jurisdiction which regulates such congregations (*l*).

5. *Of informations respecting funds applicable to public purposes.*] A few of a large number of persons may institute a suit on behalf of themselves and the rest, for relief against acts injurious to their common right; although the majority approve of such acts, and disapprove of the institution of the suit, and the attorney general is not a necessary party; but where the whole body concur in an abuse, the suit must be instituted by the attorney general (*m*).

Where by an act of parliament certain inhabitants of a parish were empowered to meet, for the purpose of making rules and regulations for the management of allotments, over which the parishioners had rights of common, and to appoint a treasurer and other officers, and to raise money by rates on such occupiers, for the purpose of carrying the rules into effect, it was held that a bill might be filed by some of the householders, on behalf of themselves and the rest, for an account of the rates received, and of the balance, and to restrain the further misapplication of the rates (*n*).

An informality in a bill filed by certain individual parishioners, omitting to state that it was "on behalf of themselves and all the other parishioners," may be cured by

(*l*) *Leslie* v. *Birnie*, 2 Russ. 119.

(*m*) *Bromley* v. *Smith*, 1 Sim. 8. See *Meux* v. *Maltby*, 2 Swanst. 277. In proceeding *against* some individuals as representing a numerous class, as the vestry of a parish, it must be alleged that the suit is brought against them in that character.—*Lanchester* v. *Thompson*, 5 Madd. 15.

(*n*) *Bromley* v. *Smith*, 1 Sim. 8.

amendment, even at the hearing of the cause, if it made any material difference, such omission being considered as merely a clerical error (*o*).

Where the object of a suit is to avoid payment of a rate levied on the inhabitants of a town, all the inhabitants having a common interest to avoid the rate, any one or more of them may sue on behalf of himself and the other inhabitants. An information and bill were filed by the attorney general and certain persons, on behalf of themselves and all others, who were assessed to a rate under the authority of the defendants, insisting that the defendants were in effect trustees for certain charitable puposes, with power to make the rate in question only in case the charitable funds were insufficient; and that such funds were ample for the purposes required; and praying, therefore, amongst other things, an account of the charitable funds, and of the application thereof by the defendants, and that they, in the mean time, might be restrained from enforcing the payment of the rate so made by them. The defendants having put in a general demurrer for want of equity, it was held that the plaintiffs had a right to sue on behalf of themselves and of all other persons on whom the rate in question was assessed (*p*).

It seems that where any fund is created for the purpose of being applied to some public purpose, a court of equity has, by its original jurisdiction, a right to see to the application of the fund, although it may not be applicable to one of the purposes mentioned in the statute of charitable uses. In the case of the *Attorney General* v. *the Corporation of Dublin*, Lord *Redesdale* said, "There is on this subject a writ in the register (*q*), which recites that the king had been given to understand that his predecessors had granted certain rates on all merchandise brought into a town, to be applied to the walling of the town; and the inhabitants having complained that the rates had not been duly applied, the writ proceeds in

(*o*) *Attorney General* v. *Newcombe*, 14 Ves. 6.

(*p*) *Attorney General* v. *Heelis*, 2 Sim. & Stu. 67, *ante*, *p.* 76. See Redesdale's Pl. p. 137, 3rd ed.; *Gort* v. *Attorney General*, 6 Dow, 137. *Ante*, p. 79.

(*q*) Reg. Brev. p. 138.

the nature of a commission for taking the account. Under such circumstances, an information at this moment would lie, at the suit of the attorney general, for taking such account. The practice of proceeding by information, rather than by the writ of account, has prevailed in consequence of the difficulty of proceeding under the writ." And then he added, "We are referred to the statute of 43 Eliz. c. 4, with respect to charitable uses, as creating a new law upon the subject of charitable uses. That statute only creates a new jurisdiction. It created no new law: it created a new and ancillary jurisdiction, borrowed from the elements which I have mentioned; a jurisdiction created by a commission to be issued out of the Court of Chancery" (*r*).

(*r*) 1 Bligh, N. S. 347. See 2 Sim. 449.

The Corporation of *Dublin* having, before the year 1777, supplied water to the inhabitants of the city from works which they had constructed; but the rents which they received being inadequate to the maintenance of the waterworks, by the Irish act 15 & 16 Geo. III., the owners or occupiers of houses were compelled to provide branch pipes from the mains of the company to the houses, and the corporation were empowered to charge the owners or occupiers with certain fixed annual rates or rents, in order to construct new mains and extend their works, to borrow money for those purposes, and to mortgage the rates for the repayment of the money so borrowed.

Under the authority of this act, the Corporation of *Dublin* from time to time borrowed on the credit of the water rents, various sums of money, which, in 1809, amounted to 67,000*l*. In that year the corporation obtained a new act of parliament (49 Geo. III.) by which they were empowered to borrow, at stated annual periods, a further sum, amounting to 32,200*l*., and to charge the debt upon the rates granted by that and the former acts. The act further required, that the interest of the money borrowed under that act should be retained out of the rates thereby granted, as well as a further sum of 2,000*l*., to be appropriated as a sinking fund to pay off the whole debt for money borrowed under that and the former acts. The act further directed, that distinct accounts should be kept of the rates received under the act, and that the surplus, after providing for the interest of the whole debt, should be applied in laying down iron or metal main and service pipes, in the general improvement and extension of the waterworks, and to increase the sinking fund; and it was declared that the rates, being granted only for such purposes, should not be subject to deductions, except for collection, nor be deemed rates for the supply of water as for sale.

The Earl of Devonshire v. *Gibbons* (*t*) establishes that the obligation to repair a sea wall, when it arises by agreement

The act then provided that the corporation should furnish annually, to be laid before parliament, an account of the sums received by them under that and the former acts, and of the manner in which the same had been expended and applied. Finally, a further provision was made by the act, for the appropriation to the sinking fund of any further surplus out of the rates.

In 1823 an information and bill were filed by the attorney general, at the relation of certain individuals, on behalf of themselves and all other the inhabitants of Dublin subject to the payment of water rates, against the corporation, which, after stating various acts of mismanagement and misappropriation of the funds arising from the rates; submitting that the corporation were trustees, under the act, of rates thereby given, for uses which were charitable in their nature; and charging that the conduct of the corporation amounted to a breach of trust; prayed (amongst other things) a declaration and execution of the trust, and that accounts might be taken of the rates received by the corporation, and the application thereof; of the sums applied to the sinking fund; of the money borrowed and due on the credit of the rates, and which had been applied in payment of the principal and interest of the debt.

To this information and bill the defendants put in an answer, by which, after admitting many of the principal facts, and setting forth various accounts, they submitted that they were not trustees; that the purposes specified in the acts were not charitable uses; that the act required the accounts to be furnished annually to the lord lieutenant, to be laid before parliament, which having been done, it was a bar to the jurisdiction of the court, of which matter they prayed the same benefit as if they had pleaded to the bill.

It was held, on appeal from the court of chancery in Ireland, that although the act of parliament ordered the account to be laid before the lord lieutenant, who was to lay the account before parliament, and that the commissioners of public accounts had likewise some authority in taking such accounts, that such provision did not oust the jurisdiction of the court of chancery, because that jurisdiction could not be taken away but by express words, or by words creating a necessary implication to that effect; and that there was no reason why the direction that the lord lieutenant should be informed of the state of the accounts, and that the commissioners of public accounts should look into these matters, and that parliament should have the accounts laid before them,—should have such an effect, those measures being rather ancillary to the jurisdiction of the court of chancery than measures to oust that court of its jurisdistion.—*Attorney General* v. *the Mayor, &c. of Dublin*, 1 Bligh, N. S. 312. *Ante*, p. 81.

(*t*) Hardr. 169.

with the crown, is of a nature which regards the commonwealth, in which every individual is interested, and therefore a party to it, and entitled to a remedy by bill in equity.

By letters patent the king granted to the mayor and burgesses of *Lyme Regis* the borough or town so called, and also the pier, quay, or cob, with all liberties and profits, &c. belonging to the same, and remitted also twenty-seven marks of their ancient rent, payable to the king; and he willed that the mayor, burgesses, and their successors, at their own costs and charges, thenceforth for ever should repair, maintain, and support, as often as it should be necessary, all and singular the buildings, banks, sea-shores, &c. within the said borough or thereto belonging, or situate between the same and the sea, and also the said pier. It was held that the mayor and burgesses, having accepted the charter, became legally bound to repair the buildings, banks, sea-shores, and mounds, and being an obligation which concerned the public, an indictment would lie, in case of non-repair, against the mayor and burgesses, for their general default; and an action on the case, for a direct and particular damage, sustained in consequence by an individual, although it was contended that the grant from the crown could not give to a stranger a right of action, and that the remedy lay solely with the king, either by seizure for non-performance of the condition, or by information at the suit of the attorney general, or under the stat. 43 Eliz. c. 4, authorising the crown to issue a commission, under which the lands might be appropriated to the repairs (*u*).

6. *Of the relator.*] Any private individual, who thinks that a charity has been abused, may file an information in the name of the attorney general, subject to his approbation, complaining of such abuse; and by so making himself the relator to the attorney general, he subjects himself to all such costs as the court may ultimately determine ought to

(*u*) *The Mayor and Burgesses of Lyme Regis* v. *Henley*, 3 B. & Adol. 77; *S. C.* 5 Bing. 91; 3 M. & P. 278; 2 Clark & Finn. 331.

be paid by the person who promoted the suit. The costs of an information are in general extremely high, so that it must be an act of great imprudence in any person to become relator in such a suit, unless it is quite clear that he shall be able to establish in evidence such a case of abuse of trust as will induce the court to make the defendants pay the costs of it, or, at all events, to order that the costs be paid out of the estate itself.

The relator is introduced properly by the attorney general, that there may be some person responsible for the costs of the proceedings, if finally the court should be of opinion that the information has been improperly instituted, or if, in the course of the proceedings, it should be in any manner improperly conducted.

It is for the benefit of the subject that the attorney general, in all proceedings by information, requires relators, that the court may award costs against them: for the attorney general prosecuting on behalf of the crown is not liable, even where he fails, to the payment of costs (*v*).

A relator has been ordered to give security by bond, with a surety, to answer the costs which the court may award, before the defendants shall be obliged to answer the information, who will be allowed a month's time to plead answer or demur (not demurring alone) to the information, after such security shall have been given (*w*).

It is not necessary that a relator should have an interest in the administration of the charitable fund, although contrary opinions were formerly entertained upon that point. Thus Lord *Hardwicke* said, "It is not absolutely necessary that relators in an information for a charity should be the persons *principally* interested, for the court will take care, at the hearing, to decree in such a manner as will best answer the purposes of the charity; and therefore any persons, though

(*v*) *Attorney General* v. *Mayor, &c. of Dublin*, 1 Bligh, N. S. 351, 2; *Corporation of Ludlow* v. *Greenhouse*, Ibid. 48.

(*w*) *Attorney General* v. *Mayor of Rochester*, Reg. lib. A. fol. 571.

the most remote in the contemplation of the charity, may be relators in these cases" (*x*).

Lord *Redesdale* states, "If the suit does not immediately concern the rights of the crown, its officers depend on the relation of some person whose name is inserted in the information, and who is termed the relator; and as the suit is carried on under his direction, he is considered as answerable to the court and to the parties for the propriety of the suit and the conduct of it. It sometimes happens that this person has an interest in the matter in dispute, of the injury to which interest he has a right to complain. In this case, his personal complaint being joined to and incorporated with the information given to the court by the officer of the crown, they form together an information and bill, and are so termed" (*y*).

In a late case, the objection that the relator, in an information for having a right declared, had no interest in the fund, was taken; but Sir *John Leach*, M.R., held, "that the character of relator did not require the least particle of private interest in the due administration of the charity" (*z*).

Where a school is established in a particular place, an information may be filed, at the relation of some of the inhabitants on behalf of themselves and the other inhabitants against the governors and head master of the school, for the general regulation of the charity (*y*).

Trustees who have granted improvident leases of a charity estate, may be the relators in an information for the purpose of setting them aside: for it cannot be objected that they come to set aside their own deliberate acts, the court being the paramount trustee of a charity (*z*).

It seems that a bill and information by some of the trustees of a charity against the others cannot be sustained, unless the

(*x*) *Attorney General* v. *Bucknall*, 2 Atk. 328. See *Attorney General* v. *Green*, 2 Br. C. C. 497.

(*y*) Redesdale's Pl. 22, 23, 4th ed.

(*z*) *Attorney General* v. *Vivian*, 1 Russ. 226.

(*y*) *Attorney General* v. *Earl of Clarendon*, 17 Ves. 491.

(*z*) *Attorney General* v. *Talbot*, cited in *Attorney General* v. *Griffiths*, 13 Ves. 571, in which case one of the trustees joined in the information.

individuals, in respect of whose interest the suit is instituted, are either collectively, or some suing for themselves and the others, made parties (*a*).

The proceedings upon an information can only abate by the death or determination of interest of the defendant. If there are several relators, the death of any of them, while one survives, will not in any degree affect the suit; but if all the relators die, or if there is but one, and that relator dies (*b*) or becomes a lunatic (*c*), the court will appoint a new relator, and will not permit any further proceeding until an order has been obtained for liberty to insert the name of a new relator, and such name is inserted accordingly; otherwise there would be no person to pay the costs of the suit in case the information should be deemed improper, or for any other reason should be dismissed (*d*).

The court refused an application by the defendant to name a relator in the place of one who was dead; and held that the application must be made by the attorney general (*e*), or with his consent (*f*).

Where a suit can be sustained by the attorney general, the circumstance of his joining, as relator, a person who is not entitled to the equitable relief he seeks, will not vitiate the proceeding (*g*).

A person who files an information in the name of the attorney general cannot dismiss it without his consent, which is required in every stage of an information (*h*).

On an information for a charity, if it appears that the relator had no title, the court will not declare that, and give directions for the administration of the charity to those who have title; but the information will be dismissed, and no costs in such a case will be given out of the charity (*i*).

(*a*) *Attorney General* v. *Fowler*, 15 Ves. 85.

(*b*) *Attorney General* v. *Powel*, Dick. 355.

(*c*) *Attorney General* v. *Tyler*, 2 Eden. 280; 1 Dick, 378.

(*d*) 1 Ves. sen. 72; 2 Ves. sen. 327; Redesdale's Pl. 100, 4th ed.

(*e*) *Attorney General* v. *Plumptree*, 5 Madd. 452.

(*f*) *Anon.* Sel. Cas. Ch. 69.

(*g*) Per Lord *Eldon*, 1 Swanst. 305.

(*h*) *Attorney General* v. *Wyatt*, 2 Fowl. 372. *Anon.* MS. 2 Madd. Ch. Pr. 165. *Ante*, p. 400

(*i*) *Attorney General* v. *Oglender*, 1 Ves. jun. 246.

7. *The attorney general may proceed without a relator.*] A relator is generally required in all proceedings by information, except where the rights of the crown are *immediately* concerned, for the purpose of securing costs, but the attorney general may, if he pleases, proceed without a relator (*i*), although it had been said, that an information to establish a charity without a relator, would not do (*j*). And Sir *John Leach* said, that before the passing of the stat. 59 Geo. III. c. 91, it was the settled practice of the Court of Chancery, that the attorney general could not proceed in an information respecting a charity without naming a relator, who might be answerable in costs to the defendant (*k*).

It was held in the House of Lords, that a fund, consisting of fees which were public money, might be the subject of an information by the attorney general alone (*l*).

By stat. 59 Geo. III. c. 91, it was enacted, that whenever upon any examination or investigation taken before the commissioners appointed under the statutes 58 Geo. III. c. 91, and 59 Geo. III. c. 81 (*m*), any case should arise or happen in which it should appear to the said commissioners, that the directions or orders of a court of equity were requisite for the remedying of any neglect, breach of trust, fraud, abuse, or misconduct in the management of any trust created for any of the charitable purposes thereinbefore mentioned; or of the estates or funds thereunto belonging, or for regulating the administration of any such trust, or of the estates or funds thereof; it should be lawful for the said commissioners or any five or more of them, if they should think fit, to certify the particulars of such case in writing under their hands to his majesty's attorney general, who was thereupon empowered, if he should so think fit, either by a summary

(*i*) 2 Swanst. 520; 1 Bligh. N.S. 337, 351. See Redesdale's Pl. 23, 4th ed.

(*j*) *Attorney General* v. *Oglender*, 1 Ves. Jun. 147.

(*k*) *Attorney General* v. *Earl of Ashburnham*, 1 Sim. & Stu. 396.

(*l*) *Mucklow* v. *Attorney General*, 4 Dow, 11, 15. See *Hudson* v. *Mucklow*, 12 East, 273.

(*m*) *Ante*, pp. 305, 307, 308.

application in the nature of a petition, or by information, as the case might require, to apply to or commence a suit in the Court of Chancery, or Exchequer sitting as a court of equity; stating and setting forth the neglect, breach of trust, fraud, abuse, or misconduct, or other cause of complaint or application, and praying such relief as the nature of the case might require; when such petition or suit is instituted in the Court of Exchequer, that court is to decide the same; and the order or decree of the same court is to be final and conclusive, unless the parties thinking themselves aggrieved shall, within one year after such order or decree, appeal to the House of Lords: when such petition or suit is commenced in the Court of Chancery, the lord chancellor, lord keeper, or lords commissioners, for the custody of the great seal, are empowered and required to order such petition or suit to be determined either before the master of the rolls or vice chancellor, who are directed to hear and rehear, if to him it shall appear necessary, and to determine the same, and all decrees, orders, and acts of the master of the rolls and vice chancellor therein are to be deemed those of the Court of Chancery, subject to be reversed or altered by the lord chancellor, lord keeper, or lords commissioners, and no decree or order is to be enrolled until signed by him, or them. By the 2nd section it is enacted, that when any appeal shall be made to the lord chancellor, &c., from any order of the master of the rolls or vice-chancellor, no appeal from the order or decree of the lord chancellor, lord keeper, or lords commissioners, to the House of Lords, shall be allowed.

By 2 Will. IV. c. 57, the commissioners appointed under the 1 & 2 Will. IV. c. 34 (*n*), or any five or more of them, are authorised to make such certificates from time to time to the attorney general, as the commissioners appointed under the 58 & 59 Geo. III.; and thereupon such proceedings were to be had as were directed by the stat. 59 Geo. III. c. 91.

It was held that an information filed by the attorney gene-

(*n*) *Ante*, pp. 309, 310.

ral, after the powers of the commissioners of charities had ceased, in pursuance of a certificate made by them while their authority was in force, could be carried on without a relator. For although the statutes under which the charity commissioners were appointed were only temporary, the correlative acts, authorising the attorney general to proceed upon their certificate, were permanent, and not confined within the same limits which circumscribed the powers of the commissioners. Therefore a motion by defendants, that an information filed by the attorney general might be taken off the file for irregularity, or all further proceedings stayed until a relator should be named, was refused, and the defendants were ordered to pay to the attorney general the costs of the application (*o*).

By stat. 5 & 6 Will. IV. c. 71, s. 18 (*p*), it is enacted, that in all cases of proceedings instituted, or to be instituted under the above acts, or of that act, the production to the court of a certificate under the hand of the attorney general, stating that the particulars have been certified to the attorney general for the time being, according to the provisions of the said recited acts of the 59 Geo. III. and the 2 Will. IV., or of the act of the 5 & 6 Will. IV. shall be deemed sufficient evidence that such particulars have been duly certified to the attorney general accordingly, for all the purposes whatever. By the 19th section of the 5 & 6 Will. IV. c. 71, the chief commissioner to be appointed in pursuance of that act, is directed to superintend all proceedings instituted or to be instituted by the attorney general, in pursuance of the above-mentioned acts, with a view to their prompt and effectual termination. By the 22nd section, the commissioners may direct informations to be filed by the attorney general before their reports are presented.

8 *Of parties to informations.*] Generally speaking, all persons interested in the subject of the suit ought to be par-

(*o*) *Attorney General* v. *Bullen*, A, 1834, fo. 190. Rolls, 24th January, 1835, Reg. lib. (*p*) *Ante*, pp. 314—316.

ties (*q*), if within the jurisdiction of the court; but if any necessary parties are omitted, or unnecessary parties are inserted, the court upon application will usually allow the proper alterations to be made (*r*).

The ordinary practice, when one party is out of the jurisdiction, and other parties within it, is to charge the fact in the bill that such a person is out of the jurisdiction, and then the court proceeds against the other parties, notwithstanding the absent party is not before it. It cannot proceed to compel him to do any act; but it can proceed against the other parties, and if the disposition of the property is in the power of the other parties, the court may act upon it (*s*).

An information against trustees, praying accounts not only against them, but referring to a period when they were not acting trustees, would be defective for want of parties (*t*).

In an information to apply money given to a charity to other uses than those expressed in the will of the donor, the trustees must be parties (*u*). And it was held that the executor must be a party to an information, filed on behalf of a charity, for discovering the profits of lands for the satisfaction of a legacy charged thereon (*v*).

Where an information is filed for setting aside a lease of a charity estate, the lessee as well as the under-lessee, or his assignee of part of the premises, should be brought before the court (*w*).

The master of the school must be a party to an information brought for his benefit; as, to have the surplus rents of charity estates applied for his use (*x*).

(*q*) *Pawlet* v. *Bishop of Lincoln*, 2 Atk. 296; *Poore* v. *Clark*, Id. 515; 1 Ves. jun. 39; 7 Ves. 563; 1 Mer. 262; 3 Mer. 512.

(*r*) 1 Redesdale's Pl. 39, 4th ed.

(*s*) *Smith* v. *Hibernian Mine Comp.* 1 Sch. & Lef. 240. See *Attorney General* v. *Baliol College*, 9 Mod. 429, 5th ed.; *Wilkinson* v. *Beal*, 5 Madd. 408; *Williams* v. *Whinyates*, 2 Br. C. C. 399.

(*t*) *Attorney General* v. *Brown*, 1 Swanst. 292; *In re Chertsey Market*, 6 Price, 278.

(*u*) *Attorney General* v. *Green*, 2 Br. C. C. 492.

(*v*) *Attorney General* v. *Twisden*, Finch. 336.

(*w*) *Attorney General* v. *Backhouse*, 17 Ves. 288. See 1 Madd. 109; 1 Bligh, N. S. 73, 4; 93.

(*x*) *Attorney General* v. *Smart*, 1 Ves. sen. 72.

Where an information at the relation of the inhabitants of a parish was filed to have a schoolmaster dismissed for improper conduct, and to have the charity regulated, and no visitor was appointed by the founder, it was held that the heir of the founder should have been a party, although the court did not dismiss the information, but directed the master to make inquiries for the heir, and to receive a scheme for the regulation of the school (*y*). So the heir of the founder was considered a necessary party by the court on a question as to the right to the increased income of a charity estate; and the master was directed to inquire who was such heir (*z*).

Where lands had been given for the endowment of a school, and also lands for the foundation of scholarships in a college, for boys to be nominated by the master of the school, the master and fellows of the college had the appointment of a master to the school, and on their default for the space of two months, the Archbishop of *York* was to appoint, an information seeking an account both of the estates given for the school, and of those given for the scholarships, was held to be defective for want of parties, because the Archbishop of *York* had not been made a party (*a*).

Where a testator had given a residue to be laid out for the advancement of the Christian religion amongst infidels, and by a decree the rents of the charity estate had been directed to be applied in the advancement of the christian religion among infidels, as the Bishop of *London* for the time being should appoint; and he directed the rents to be paid to a college in *Virginia*, to educate in the Christian religion Indian children, as far as the fund would go; the college having been emancipated and become subject to a foreign power, the independent states of America: on an information and bill by the Bishop of *London*, to have the rents of the estate applied for the promotion of the Christian religion in England, it was held that the bishop had not sufficient interest to sus-

(*y*) *Attorney General* v. *Gaunt*, 3 Swanst. 148, n.

(*z*) *Attorney General* v. *Tonna*, 4 Br. C. C. 177. See 1 Bligh, N. S. 55.

(*a*) *Attorney General* v. *St. John's College*, V. C. 19 Jan. 1835, 4 L. Journ. N. S. Chanc. 73.

tain a bill for the purpose, although the information was proper (*a*).

Where an information and bill were filed by the vicar of a parish for setting aside leases of glebe land, in which the king had no interest as patron, it was held not to be a proper case for an information; for the king, or his attorney general, had no other interest in the suit than that of vindicating the rights of the church, as in the case of a subtraction of tithes, in a suit for the recovery of which the attorney general never joins (*b*).

It is a general rule, that upon a bill for equitable relief as to a rent charge, all the persons whose estates are liable must be brought before the court, that complete justice may be done, and the question tried in the presence of all who are interested, and contribution amongst them settled; this rule, however, has been dispensed with in the case of either plaintiffs or defendants, under circumstances making its application impracticable, or so inconvenient that a failure of justice would be the consequence of enforcing it (*c*), and has been further relaxed in favour of charities, in which cases the court sometimes grants relief where it would be refused against defendants in ordinary cases (*d*).

A question has been raised, whether in a suit in equity for the recovery of a rent charge, issuing out of divers lands for the benefit of a charity, the charity can call upon one party only to pay; not contending that the others are discharged, but insisting that the rule of pleading is, that the charity may bring any one of the estates before the court, leaving the owner of that estate, to sue as he can the others for contribution. Upon this point there is some apparent contradiction in the old cases. Thus it is laid down that if a rent charge be granted to a charitable use out of lands in

(*a*) *Attorney General* v. *City of London*, 1 Ves. jun. 243; *S. C.* 3 Br. C. C. 171.

(*b*) *Attorney General* v. *Moses*, 2 Madd. 294.

(*c*) *Adair* v. *the New River Company*, 443, 444; *Cockburn* v. *Thompson*, 16 Ves. 326; *Meux* v. *Maltby*, 2 Swanst. 277, and the cases there cited.

(*d*) *Attorney General* v. *Jackson*, 11 Ves. 367.

several counties, the commissioners are to charge this rent by their decree upon all the lands in every county, according to an equal distribution, having regard to the yearly value of all the lands chargeable with the rent, and cannot by their decree charge one or two manors with all the rent, and discharge the residue in other counties or places; for that their decree will then be contrary to the will of the founders or donors (*f*). Lord *Eldon*, in endeavouring to reconcile this passage with the cases of the *Attorney General* v. *Shelley* (*g*), and the *Attorney General* v. *Wyburgh* (*h*), said (*i*), "probably the meaning was only, that when the commissioners are inquiring, and find a rent charge actually given, they cannot by arrangement say it shall be paid out of a particular estate, and discharge other estates which are charged, but must establish the charity as it was established by the founder."

In the *Attorney General* v. *Shelley* (*k*), on a bill for the recovery of an annuity out of land for the maintenance of *Watford School*, it was objected that all the terre-tenants of the lands charged ought to be brought before the court, but the contrary was held; for every part of the land is liable, and the charity ought not to be put to that difficulty; but the terre-tenants might, if they sought a contribution, undertake to make them parties to the information, or help themselves by such course as they thought fit. Lord *Eldon* said, the principle here asserted is, that *primâ facie* a charity may sue without making them all parties; but I cannot understand the concluding passage unless in this sense, which is conformable to the case of the *Attorney General* v. *Wyburgh* (*l*), that if the defendants insist that there shall be other parties, and can point out who they are, in that sense undertaking to enable the relators to make them parties, then they may be made parties; or if neither of them in all probability knowing the other property that is chargeable, neither can point out the persons who in respect of that property ought to be

(*f*) Duke 65, pl. 7. *Ante*, p. 299.
(*g*) 1 Salk. 163.
(*h*) 1 P. Wms. 599.
(*i*) 11 Ves. 368.
(*k*) 1 Salk. 163.
(*l*) 1 P. Wms. 599.

parties, there can be no species of undertaking by the terre-tenants with a view to make them parties, unless they have a right to pray the assistance of the court to make that inquiry; that all may be made parties before payment is compelled.

In the *Attorney General* v. *Wyburgh* (*m*), it appeared that lands in *Chigwell* in *Essex*, and in *Enfield* in *Middlesex*, were charged with 20*l. per annum* to the poor of *Enfield*, and an information being brought to make divers lands in *Enfield* liable to the charity, leaving out the *Chigwell* lands, one of the defendants by his answer insisted that the *Chigwell* lands ought to contribute, and the owners thereof made parties, no person being before the court who had lands there. But Lord Chancellor *Macclesfield* said it was in the nature of a plea in abatement; and unless it be insisted on in the answer, and the particular owners shown, he would put the owners of the *Enfield* lands to take the labouring oar on themselves to find out the *Chigwell* lands, and bring their bill for that purpose, if they thought fit; for at that distance of time (the charitable gift being in 1651) the lands might be lost, or not distinguishable, or purchased without notice; and if the charity lost the *Chigwell* lands, it would be strange to make use of that as a reason why it should lose the *Enfield* lands likewise; and in that case a reference was made to take the accounts, and see what was due for the arrears, and what lands were set apart, and what was the value of those lands, and which of the parties had contributed towards the payment or the repairs of the premises; and the decree proceeded to direct an inquiry, "what lands there are liable to the payment of the rent, (that is, though not set apart;) and in whose possession, and what is the value of the said lands, and to state the whole matter specially" (*n*). Lord *Eldon* observed (*o*), upon what is said by Lord *Macclesfield* upon a plea in abatement, it has been justly observed, that, according to the rules of pleading, as Lord *Redesdale* states (*p*), it is not

(*m*) 1 P. Wms. 599; 11 Ves. 369.

(*n*) 11 Ves. 372.

(*o*) *Ibid.* 369, 370.

(*p*) Tr. on Pl. 180, 4th ed.

necessary to point out the parties by name: it is enough if the objection points out who the individuals are by some description, enabling the plaintiff to make them parties; and, according to the modern course of pleading, that declaration of Lord *Macclesfield*, which is capable of that interpretation, ought to be so understood; that his lordship's intention was not to say, the parties must be shown by name; but he made the observation in a case in which he felt that lands in *Chigwell* had been originally charged; but what they were, and therefore who were the owners, could not be pointed out by an answer insisting only that the *Chigwell* lands ought to contribute, not describing them or pointing the attention of the relators to the owners. And that what Lord *Macclesfield* was represented to have said in his judgment did not go farther than that, though a general objection for want of parties is stated, yet if it is left uncertain what are the lands and houses chargeable with those which are the object of the information, though they may have been purchased without notice, lost, or are incapable of being distinguished, the court will go on; but will endeavour to aid the other persons who are brought before the court, not dismissing the information, but, by inquiries if any fair hopes can be entertained, endeavouring to bring ultimately before the court those other lands or houses, if it can be ascertained that they are not lost, or are capable of being distinguished.

Where the object of an information was to establish the right of a charity to a small annual payment, charged upon premises in *London*, and the answer raised an objection that all the owners of the premises, which were referred to generally as houses in *London*, without any particular description, were not parties—Lord *Eldon*, after stating and commenting on the cases, said, "the result is this at least: that if there is before the court a party who, in respect of land possessed by him, is liable to a rent charged upon that and other land not clearly and distinctly pointed out by objection for want of parties in the answer, further than that there were some houses originally charged, and the court does not know who are liable with the defendants, the court will go on at least

to inquire whether the defendants are liable; whether, if they are liable, the court will charge them, and leave them to a new suit, with the other terre-tenants; or, first deciding that those lands are chargeable, will direct inquiries whether any and what other lands are chargeable with them, it seems the court will not stop for want of parties under such circumstances, and I think it better to determine whether these lands are chargeable or not: for if not, the information ought to be dismissed; but if I should now stop for want of parties, conceiving that I cannot dismiss the information, I should then direct expensive inquiries, at the hazard that I might find the case had not been actually established in fact, even as against the parties now before the court; the best way, therefore, is to go on to hear the question, whether the rent-charge can be proved to be issuing out of the land in question, reserving the consideration as to what I shall do as to any lands that may appear chargeable in the course of the hearing, until that principal question shall have been decided" (*q*).

Where a testatrix gave a legacy to trustees, in trust, for the benefit of the minister of a certain chapel, if divine service should be performed in it within two years after her death; and until service should be regularly performed, the interest of the legacy was directed to be distributed among clergymen's widows belonging to a certain college at *Salisbury;* and if the chapel was not actually consecrated and in constant use within three years, at furthest, from her death, then the interest of the legacy was given for ever to the widows of the said college. On an information, filed several years after the death of the testatrix, for establishing the trust in favour of the minister of the chapel, it appeared that the dividends had been paid for sixteeen years to the minister of the chapel, which had been consecrated before the expiration of the term fixed by the testatrix, and divine service regularly performed in it. The trustees of the college were not parties to the suit, and it was objected that no evidence was given that the contingency, on which the interest of the college was to

(*q*) *Attorney General* v. *Jackson*, 11 Ves. 365—372.

arise, had not happened; and that whether it had or had not happened, could not be determined in the absence of the trustees of the college; but the court, under the circumstances of the case, decided that the charity might be established in their absence, and made a decree accordingly, without any reference to the master, to inquire whether the chapel had been consecrated, and in regular use for divine service within the term prescribed by the will of the testatrix (*r*).

There are instances of ancient date in which the Court of Chancery has decreed the payment of money to be levied by a parish rate (*s*); but in some cases (*t*), the court refused to entertain such a jurisdiction, and in others (*u*) expressed an opinion against it; and it was held that a rate cannot be made to repay money borrowed to repair and rebuild a workhouse (*v*).

Where a bill was filed by a former churchwarden against the parish officers, trustees of an estate for the poor of the parish and all inhabitants (forty in number), to be reimbursed money, laid out on account of the trust, under an order of vestry, his accounts having been passed, and an order for payment made; on a demurrer to the relief put in by one of the defendants, who was not a trustee nor a parish officer, Lord *Loughborough* expressed a strong opinion against such a bill, on the ground that half the parishes in the kingdom might be ruined if such a jurisdiction were entertained (*w*).

A parish cannot be made answerable or accountable for the misapplication of charity funds, like a corporation; but the

(*r*) *Attorney General* v. *Goddard*, 1 Turn. & Russ. 348.

(*s*) *James* v. *Rich*, cited Prec. Ch. 43; *Birch* v. *Barston*, Id.; *Nicholson* v. *Masters*, Vin. Abr. Churchwarden (C) pl. 9; Case of *Radnor* parish, *Ibid.*

(*t*) *Batteley* v. *Cooke*, Prec. Ch. 42; *S. C.* 2 Vern. 262.

(*u*) *Greenfield* v. *Raynall*, 2 P. Wms. 634 n.; and *French* v. *Dear*, 5 Ves. 547.

(*v*) *Rex* v. *Wavell*, 1 Dougl. 116, 4th ed.; but see *Blackbourn* v. *Webster*, 2 P. Wms. 632.

(*w*) *French* v. *Dear*, 5 Ves. 547. The bill was ordered to be taken off the file, because it was not signed by counsel. See *Dillon* v. *Francis*, 1 Dick. 68; so as to an answer—*Brown* v. *Bruce*, 2 Mer. 1; Beames' Orders in Ch. 25, 70, 165; it is good ground of demurrer, 5 Madd. 378.

relief, if any, must be sought against the individuals, or their representatives, who have committed the breach of trust (*x*).

(*x*) It is stated by one of the commissioners of charities, that "a great deal of charity-money is lost, from the circumstance that there is no mode of suing a parish. The money is left, perhaps, by the testator to the churchwardens and overseers of the parish for the use of the poor of that parish. Now it often happens that such money is misapplied and lost, and the parish cannot be sued in the Court of Chancery; you cannot make all persons parties; therefore if the charity-money is lost, there is no remedy against the parish as there is against a corporation. The only remedy is to state to the parish that if they do not refund, the commissioners will publish the fact in their reports. The answer of the parish commonly is, they have no power to levy a rate on the inhabitants of the parish to make good their defaults."

Amongst other suggestions submitted to the committee of the House of Commons for the management of charities, it was proposed "that in every parish, a board be formed, called the Charity Board of the parish, which shall be a corporation for the purpose of holding all charity property given for the benefit of the parish or its poor. The board to consist of the incumbent of the parish, the resident minister, the minister's churchwarden, the vestry-clerk, and not less than four, or more than twenty, other persons, to be elected by the parish in vestry assembled. If the parish neglects to elect, the Board to be deemed to consist of the persons above named and the remaining parish-officers until the election takes place. If the parish elects, the implication of law not to arise so long as four nominees continue to form part of the Board, in addition to the *ex officio* members. In cases in which all the trustees of charity property belonging to a parish, appointed by the foundation or last trust deed are dead, or where no trustees were appointed by the founder of a charity, or parish officers, the Charity Board to be deemed the trustees thereof for all purposes whatsoever. Parishes to be held accountable for all loss and misapplication of charity monies vested in the Charity Boards, and to be liable to refund all such monies on an information exhibited or a petition presented by the Central Board, setting forth such misapplication. Parishes to sue and be sued in the name of their Charity Board in all charity matters, and to be empowered to make a rate for making good the defaults of parishes. Parishes and their Charity Boards to have the power of recovering from individual parishioners or their representatives, in a summary way before a magistrate, any charity sums not exceeding a certain amount in the whole, that they may be proved to have misapplied, the parish to be responsible as a body, and to be sued in their corporate capacity.—Report of Committee on Charities, ordered by the House of Commons to be printed, 30th July, 1835, pp. 41, 42.

By will, dated 12th July, 1629, a testator gave to his executors the sum of 1220*l.* for the foundation of an hospital in the parish of *St. Olave, Hart Street, London,* "for the harbouring of ten aged poor people, men and women, who have been householders in the said parish, of good name and reputation, who shall fall into poverty and decay." The testator also left a sum of 2280*l.* to be invested in the purchase of lands for the maintenance of the poor persons. The objects of the charity were to be nominated by his executors until his heir should attain the age of twenty-one years, and, after that period, by his heir, whom he advised to take the opinions and judgments of the vestrymen of the said parish, or of some convenient number of the ancientest and discreetest of them. The executors were empowered to make rules and orders for the government of the charity.

It appeared by the master's report, under a reference made upon a petition under the statute 52 Geo. III. c. 101 (*y*), that the early history of the charity was involved in obscurity. An hospital had been erected, which, with seven tenements situated in the parish, was the only property that could be ascertained to have belonged to the charity. What portion of the testator's bequest had been appropriated according to his directions was uncertain. The parish of *St. Olave* had very early assumed the government of the charity, and from several circumstances that appeared in evidence, the master inferred, that till the year 1738, the property had been employed agreeably to the intentions of the founder, or nearly so. In the year 1738, the hospital was, by an order of the vestry, devoted to the use of the poor of the parish; the rents of the seven tenements continued to be received by the parish officers; and in the year 1766, a part of the hospital was sold, under an act of Parliament, to the city of *London,* for 260*l.* The master reported that sum, together with 982*l.* 17*s.* 4*d.* for rents received since the year 1738, to be due from the parish.

On a petition being presented to confirm the report, and

(*y*) See *post,* Sect. VI.

praying that the parish officers might be directed within a month to pay into the name of the accountant general the amount reported due, and that the parish might be charged with an occupation rent for the premises belonging to the charity in their occupation, and that such rent might also be directed to be paid by the parish officers.

The court entertained, in the first place, some doubt as to the alleged breach of trust; for although the property had been devoted to the poor of the parish generally, instead of the ten persons intended to be the objects of the charity, yet as out of the numbers maintained, there might have been more than ten of the proper description, who might have received as much as if the property had been applied precisely according to the donor's direction; and as if, instead of being incorporated with the other poor, they had been allowed to live upon their own funds, and if they had been as well supported as they would have been otherwise; that the participation of others was of no consequence, and that no injustice had been done. But it was held, that the parish was not responsible, for the breach of trust (if any) was committed by individuals their predecessors, to whom recourse should have been had, a parish being a fluctuating body not at all similar to a corporation (*z*).

(*z*) *Ex parte, Fowlser in re Lord Sudbury's Charity*, 1 Jac. & Walk. 70.

Formerly if overseers of the poor disbursed sums beyond the actual amount of the assessments of the year, they could not be indemnified out of the rates of the following year, on the ground that the burthen of the year must be borne by those who, during that year, answer the description of occupiers; and therefore an officer who disbursed for parochial purposes more than the amount of the parochial assessments, would not be reimbursed out of the assessments of a succeeding year. *Tawney's* Case, 2 Ld. Raym. 1012. This principle is followed in a court of equity, which will not interfere in favour of a party who omits to avail himself of his legal remedy, nor enable an incumbrancer of parish rates to obtain payment of arrears which he neglected to claim when they became due; *Drewry* v. *Barnes*, 3 Russ. 94. By stat. 41 Geo. III. c. 23, s. 9, overseers are empowered to reimburse preceding overseers, but that act does not extend to churchrates, and therefore the court refused to decree a rate to be made to reimburse a former churchwarden, mo-

A judicial declaration has been made that property vested in the rector, churchwardens, and other trustees for the benefit and advantage of a parish generally, is not liable to make good the amount of charity funds, which had been misapplied by the officers of the parish for a considerable period. Although the information was retained until 1845, in order that, on the expiration of an existing lease of the charity property, a scheme may be settled for the application of the increased income; and, in the mean time, the churchwardens for the time being were ordered to accumulate the surplus rents of the charity estate, after making certain payments directed by the will of the donor (*a*).

Unless a defendant has some interest in the subject matter of the suit, he may be examined as a witness, and therefore cannot in general be compelled to answer a bill for a discovery (*b*); for such a bill can only be to gain evidence, and the answer of the defendant cannot be read against any other person, not even against another defendant to the same bill (*c*). But if the bill states that the defendant has or claims an interest, a demurrer, which admits the bill to be true, of course will not hold (*d*), though the defendant has no interest; and he can then only avoid answering the bill by plea or disclaimer. If such a defendant does not avail himself of his right to demur or plead, but submits to answer, he must answer fully (*e*). There is an exception to the rule in the case of a corporation; for as a corporation can answer no otherwise than under their common seal—and therefore, though they answer falsely, there is no remedy against them

nies laid out whilst in office, in pursuance of a vestry order; *Lanchester* v. *Thompson*, 5 Madd. 4. See 1 Bing. 201; 8 Moore, 20; 2 Bing. 361; 9 Moore, 688; 3 Bing. 478. *Rex* v. *Chapel-wardens of Haworth*, 12 East, 556.

(*a*) *Attorney General* v. *Townley and others*, Reg. Lib. A. 1829, fol. 1905, 6.

(*b*) *Steward* v. *East India Company*, 2 Vern. 380; *Dineley* v. *Dineley*, 2 Atk. 394; *Plummer* v. *May*, 1 Ves. sen. 426; *How* v. *Best*, 5 Madd. 19.

(*c*) 2 Vern. 380; *Wych* v. *Meal*, 3 P. Wms. 311, n. (I).

(*d*) 1 Ves. sen. 426. See *Fenton* v. *Hughes*, 7 Ves. 287; 14 Ves. 252.

(*e*) *Cookson* v. *Ellison*, 2 Br. C. C. 252, and note by Eden, Id.

for perjury—it has been usual, where a discovery of entries in the books of the corporation, or of any act done by the corporation, has been necessary, to make their secretary or book-keeper, or other officer a party (because generally he is the person who can give the information); and a demurrer because the bill showed no claim of interest in the defendant has been overruled (*e*).

Thus where a bill was filed against a corporation, who were trustees of a charity for a discovery and injunction against a resolution depriving the plaintiff of his office of schoolmaster, charged to have been procured by five of the members of the corporation, including the bailiff, from corrupt motives, with reference to a parliamentary election; a demurrer put in by the five defendants named in the bill, on the ground that no decree could be made against them, and that they were mere witnesses; and *ore tenus*, that the charge would be the subject of a criminal prosecution—was overruled without prejudice to the defendants insisting by the answer against making discovery (*f*). In the case last cited, Lord *Eldon* said, that he could not discover what particular circumstances would authorise the court to order, that besides the clerk of the company, such principal members as the plaintiff should think fit, should answer upon oath, but he could fancy the principle. And supposed an individual corporator, whose estate was charged with a rent or payment to a charitable use, of which the corporation had the management, had obtained possession of the deed; and had destroyed or cancelled it: upon an information in the Court of Chancery for the purpose of having the estate of the charity properly administered by the corporation who were trustees, it would be perfectly competent to call upon the mayor, if he was the individual implicated in that conduct, not only to answer with the rest under their common seal,

(*e*) 3 P. Wms. 312, Redesdale's Pl. p. 188, 4th ed. See *Moondalay* v. *Morton*; *The same* v. *East India Company*, 1 Br. C. C. 468; *Gibbons* v. *Waterloo Bridge Company*, 5 Price, 491.

(*f*) *Dummer* v. *The Corporation of Chippenham*, 14 Ves. 245.

but also to answer as to the circumstances relative to that deed, supposed to be in his hands (*g*).

In the Court of Chancery, where a bill is brought against a corporation, if the corporation is in contempt, there is no remedy by way of proceeding for a contempt *personally* against the real parties who offend; but the mode of compulsion is by sequestration, by taking possession of the personal estate, and the rents and profits of the real estate, of the college or corporation (*h*).

9. *Directions for establishing charities will be given, notwithstanding informality in information.*] In all cases but those of charity, the decree must be founded on the prayer of the bill (*i*).

In an information by the attorney general for the regulation of a charity, it is the business of the court to give a proper direction as to the charity, without any regard at all to the propriety or impropriety of the prayer of the information (*k*). And even where wrong relief is prayed, the

(*g*) 14 Ves. 253, 254.

(*h*) *Rex* v. *Windham*, Cowp. 377. After a *distringas* and *alias pluries*, *distringas* had issued against the defendants for want of their answer to an information, and the sheriff of the county had returned, that he had made a distress on the mayor, &c., who persisted in their contempt, a commission of sequestration was ordered to be issued to certain commissioners to sequester the said defendants' personal estates and the rents of their real estates, until the defendants should fully answer the information and clear the contempt; *Attorney General* v. *Mayor, &c. of Leicester*, Reg. lib. A. 1834, fol. 206. See *Attorney General* v. *Leathersellers' Company*, Ibid. fol. 252.

(*i*) It is usual to add to the prayer of the bill, a general prayer of such relief as the circumstances of the case may require; so that if the plaintiff mistakes the relief to which he is entitled, the court may afford him that relief to which he is entitled, according to the case made by the bill. 2 Mod. 91, 92; 2 Atk. 141; 3 Atk. 132; 2 Ves. sen. 225.

(*k*) *Attorney General* v. *Jeanes*, 1 Atk. 355; *Attorney General* v. *Parker*, 1 Ves. sen. 43; *Attorney General* v. *Scott*, 1 Ves. sen. 418; *Attorney General* v. *Governors of Harrow School*, 2 Ves. sen. 552; *Attorney General* v. *Mayor of Stamford*, 2 Swanst. 591; *Attorney General* v. *Foyster*, 1 Anstr. 116; *Attorney General* v. *Lord Gower*, 9 Mod. 228, 5th ed.

court will give such relief as the justice of the case requires (*l*).

On an information praying that a lease, granted by the trustees of a charity estate, might be set aside and declared void; and for general relief, a direction for an account of rent will be given, the general prayer being sufficient to authorise the court to give such relief as is adapted to the case (*m*).

In administering a charity, although particular grounds of complaint are not brought forward; yet the court, if necessary, is to pay attention to objects which might have been made just causes of complaint (*n*).

Therefore, where it appeared in the course of the proceedings in a cause that a lecturer was entitled to a benefit, the court directed a proper application of it, although no information was brought by the lecturer for the purpose (*o*).

Where a record is both an information and a bill, and the whole of the relief specifically prayed is in respect of an alleged interest of the relators in the trust property, the court, if it sees that there is any occasion for regulation in the management of the charity, will not dismiss the information, even though the claim of interest on the part of the relators is so groundless that their bill is dismissed with costs (*p*).

If any difference could arise from considering a proceeding either as an information only, or as an information and bill, leave will be given to amend such a mere slip (*q*).

So where the attorney general was not a party, as he ought to have been, the plaintiffs on appeal had liberty granted of

(*l*) *Attorney General* v. *Whiteley*, 11 Ves. 247.

(*m*) *Attorney General* v. *Brooke*, 18 Ves. 319.

(*n*) *Attorney General* v. *Coopers' Company*, 19 Ves. 194.

(*o*) *Attorney General* v. *Gardner*, Barnard. 490; *Attorney General* v. *Lord Gore*, Barnard. 151; *Attorney General* v. *Brereton*, 2 Ves. sen. 426.

(*p*) *Attorney General* v. *Vivian*, 1 Russ. 226.

(*q*) *Attorney General* v. *Newcombe*, 14 Ves. 7.

amending the bill, by making the same a bill and information, or information only, as they should be advised (*r*).

An information was dismissed with costs, where no question was raised as to the charitable use, but an alleged right of electing a curate was the only thing sought to be established (*s*).

Although an information on behalf of a charity will not generally be dismissed for defect of form, yet the court is careful not to injure defendants by overlooking error in form; and therefore where it was attempted to set aside a decree which had been made in a former suit, on a suggestion of fraud and want of parties, an information, neither stating such decree nor denoting an intention to impeach it, was dismissed, because the decree was not regularly put in issue on the record, although stated in the defendant's answer: for the charges against the decree might require an answer from the defendant, and inquiries how the decree could be sustained (*t*). Upon this principle (*u*), that such relief will be given upon a charity information, as the case requires, where the court, instead of declaring by the decree the nature of the charity, had sent that question to the master, who decided it, although strictly there ought to have been a re-hearing, the court, upon exceptions to the master's report, declared what the nature of the charity was.

10. *Plea, Demurrer, Multifariousness.*] The same rules of pleading are to be observed with respect to charities as in other cases; but it does not come within the compass of this work to enter upon that part of the subject, any further than by stating some cases which have been decided with respect to informations for establishing charitable gifts (*v*).

(*r*) *President of St. Mary Magdalen, Oxford*, v. *Sibthorpe*, 1 Russ. 154; *S. C.* 2 Younge & Jerv. 64, n.

(*s*) *Attorney General* v. *Parker*, 1 Ves. sen. 43. See *ante*, p. 335.

(*t*) *Attorney General* v. *Warren*, 2 Swanst. 29; *S. C.* 1 Wils. C. C. 387.

(*u*) *Attorney General* v. *Whiteley*, 11 Ves. 247.

(*v*) See Redesdale's Pl. 4th ed. *passim*; Beames' Elements of Pleas

One writer on this subject states that he is not aware that the precise question, whether informations are subject to *all* the same pleas as original bills, has in any instance undergone discussion (*w*), though it has been laid down that informations are subject to most, or all of the same pleas as original bills (*x*).

The court goes very far in relieving against want of form, and mistakes in pleadings as to charities (*y*). We have already seen that on an information to admit fellows of a college, a plea that by the statutes the visitor of the college ought to determine all controversies concerning the election of fellows, and that such controversies ought not to be determined before any other jurisdiction, was considered good and allowed (*z*).

Where a bill contains any allegations which, if not denied, would defeat the plea—that is, make it possible that the matter of the plea should be true, and yet the complaint of the bill remain unanswered, these allegations must be negatived; otherwise the plea does not perform its office—it is no defence against the bill; but where the bill is such that the whole of its averments may be admitted, and yet the plea being also admitted the plaintiff's case is defeated, then the plea must needs be good.

Lands were conveyed to the master and fellows of *St. John's College, Cambridge,* to maintain in that college five scholars, to be nominated by the college, a preference being given to those educated at *Pocklington Grammar School,* to be received into the college with the same exhibition as any other scholar of the donor's foundation in that college. An information was filed, stating that the college had enjoyed the lands, which had greatly increased in value, without paying any sum for the maintenance of scholars from *Pocklington School,* but had applied the rents (except 1*l.* 4*s.* 11*d.*)

in Equity. See Orders in Chancery, 3rd April, 1828; 2 Russ. 21st December, 1833; 1 Mylne & Keen.

(*w*) Beames' Pl. 313.

(*x*) Coop. Pl. 307.

(*y*) 11 Ves. 371. *Ante,* pp. 444, 445.

(*z*) *Attorney General* v. *Talbot,* 3 Atk. 662; 1 Ves. sen. 78. See 1 Ves. sen. 474; 1 Atk. 360; Redesdale, Pl. 183, 3rd ed. *Ante,* p. 357.

to their use, and that no scholars from that school had, for many years, been maintained in the college; and praying an account of the rents of the lands conveyed to the college, and a declaration that the same were applicable in maintaining the scholarships. The information contained no statement that any scholars had been tendered, or refused, or nominated by those who had the right of nomination, nor any averment that the scholars were not maintained by the college in the manner required by the endowment. A plea, consisting of the endowment only, which was not set forth in the information, by the college, but without any averment that the college had always admitted and sustained the scholars, was allowed, because the information contained no statement which rendered such an averment necessary (*z*).

On a bill for carrying a charity into execution, the defendant may demur and show for cause of demurrer, that the charitable legacies are void in law (*a*).

Where the stat. 9 Geo. II. c. 36, is pleaded to an information by defendants, whether in possession or not, they need not show a title in themselves; but it is enough to show a want of title in the relators (*b*).

Where an information stated certain bequests to have been made to the defendants upon certain trusts, and that other bequests had been made to them upon the like trusts, a plea by the defendants of a will, containing a bequest to the defendants, upon a like trust; but in which another company was interested, and that such company was not a party to the suit,—was overruled (*c*).

Where an information alleged certain sums to be vested in the defendants for certain charitable purposes, and that the defendants had misapplied those sums; and also alleged generally that other sums were vested in the defendants upon

(*z*) *Attorney General* v. *St. John's College*, 1 Coop. Rep. Ld. *Brougham's* Judgments, 401. See *Bayley* v. *Adams*, 6 Ves. 586; *Roche* v. *Magell*, 2 Sch. & Lef. 721.

(*a*) *Attorney General* v. *Nash*, 2 Br. C. C. 589.

(*b*) *Attorney General* v. *Lord Weymouth*, Ambl. 22.

(*c*) *Attorney General* v. *Merchant Taylors' Company*, 5 Sim. 323.

like trusts, but did not charge any misapplication or breach of trust with respect to them, it was held that the defendants were not compellable to answer the general allegation; for the court cannot administer relief unless misapplication is shown, and consequently all statements contained in the record upon which no relief could be given, were considered irrelevant (*d*).

In 1803, a bill, to which the attorney general was a party, had been filed by the respondent, praying a declaration that a bequest for charitable purposes was void; upon that bill a decree was made in favour of the respondent and others in 1809, under which they held the property without dispute until 1823, when a bill was filed by the appellants, stating the former bill and proceedings, but omitting to state that the attorney general was a party. To this bill the respondent put in a general demurrer, which was overruled, because it did not appear on the face of the bill that the attorney general was a party to the former suit; but leave was given to put in a plea of the decree on further directions in the former cause, in bar of the information, which was accordingly done. The plea consisted of a statement of the former suit and proceedings, and the decree made under it. The appellant then presented a petition of re-hearing of the former suit; but the plea was allowed, and the decree affirmed on re-hearing (*e*).

The court will not permit a plaintiff to demand, by one bill, several matters of different natures against several defendants; for this would tend to load each defendant with an unnecessary burthen of costs, by swelling the pleadings with the state of the several claims of the other defendants with which he has no connection. A defendant may therefore demur, because the plaintiff demands several matters of different natures, of several defendants, by the same bill (*f*).

But the rule is not confined within the narrow limits laid down by Lord *Redesdale*, for it is not competent for a *sole*

(*d*) *Attorney General* v. *Merchant Taylors' Company*, 5 Sim. 328.

(*e*) *Attorney General* v. *Mill*, 5 Bligh, N. S. 593; *S. C.* 2 Dow & Clark, 393.

(*f*) Redesdale, Pl. 181, 4th ed. See Prax. Alm. Cur. Canc. 2nd vol. 493; Willis on Pl. 404.

plaintiff in a bill against a *sole* defendant, to unite all sorts of matters wherein they may be mutually concerned; for a court of equity, so far follows the practice of the courts of law as to give its judgment in one case; and though at law in an action of debt, the plaintiff may declare both upon a specialty, and on a simple contract, yet he cannot join in one action, covenant, case, trover, detinue, &c. So a court of equity requires, that one subject should be presented for its decision, and will not allow itself to be called upon to pronounce different decrees, on several totally distinct matters.

An information, after stating a will by which property was given to the defendants for making loans to young men free of the company, to assist them in trade and otherwise, alleged *that divers other bequests and donations had been made to the company, for the purpose of making loans to young men for their advancement in business or in life;* but no part thereof had, for a great number of years, been applied for any charitable purposes as aforesaid, and prayed that the principal and all other, if any, like gifts and bequests to the company for loans might be established, and the due performance of the charitable trusts enforced for the future, that a scheme might be framed for that purpose, and for an account of the rents of the estates. A demurrer to the information by the company, because it was exhibited against them for several and distinct matters which ought not to be joined together in one information, was allowed; for the court requires that one subject should be presented to it for its decision, and will not allow itself to be called upon to pronounce different decrees on several totally distinct matters. There might be a thousand such charities for making loans to young men, of different descriptions, which could not be embraced in one decree, and in one scheme. If it had been so alleged in the information as to show that the character of all the other bequests was homogeneous, though there might be minute differences between them, they might all have been comprised in the same information. But where there is a total want of any such allegation, it must be supposed that the other bequests and donations are totally distinct from,

and in no way homogeneous with, the principal object of the suit (*g*). But leave was given to the relators to amend, by striking out such parts of the information as related to the general charge.

A demurrer for multifariousness to an information, containing general sweeping charges, was disallowed, and the court directed a reference to the attorney general, to prevent the defendants from being unnecessarily harassed by these charges (*h*).

An information seeking an account of estates given for the endowment of a school and foundations of scholarships in a college, for boys to be nominated by the master, &c. of the school, and asking reference for schemes for both charities, was held to be multifarious; because the grant to the college for the maintenance of the five individuals who were to be sent from the *Pocklington* school was quite separate from the formation of the school; that grant in effect creating a sort of charity for five individuals which came into existence by virtue of their being sent away from the school. And the administration of the latter charity was quite a different thing from the management of the school.

By the information two questions were raised—one how the school was to be managed—another, what was the benefit which these five individuals, not the school, who had ceased to have any connection with it, should have out of the estates given to the college? These questions were in their origin distinct, and in reality the charity for the school, and for these five individuals, had no connection with each other, and the question whether the information embraced two distinct subjects ought to be considered with reference to this—can one defence be made to the whole information? And it did not appear that any defence which the college might put in as to the administration of the school, would apply to that part of the case requiring a larger benefit to be given to the five individuals belonging to the college; and therefore

(*g*) *Attorney General* v. *Goldsmiths' Company*, 5 Sim. 670.

(*h*) *Attorney General* v. *Merchant Taylors' Company*, 5 Sim. 288.

that the college might take the objection of multifariousness (*i*).

An objection to a bill or information, on the ground that it is multifarious, must be made by demurrer, and cannot be insisted on by the answer (*k*), nor taken at the hearing of the cause (*l*).

A demurrer for multifariousness was allowed to an information, stating that a corporation was seised of real estates for purposes of public utility, and of other real estates, in trust for private charity; and that the defendants had sold part of the first mentioned estates, and were selling the remainder, and charging a general misapplication of the funds and abuses of the charity, and praying an injunction to restrain the first, and the court's regulation of the latter (*m*).

In a suit against a corporation to establish eight charitable trusts, of which seven were for the benefit of poor members of the corporation exclusively, and the eighth was subject to a fixed payment to another corporation, it was held that this latter corporation was a necessary party as the suit was then framed, and that as such an addition of parties might render the suit multifarious, leave was given to amend the information, by striking out the matter relating to the charity last mentioned (*n*).

Where the object of an information was to have an account taken of what the defendant had received as treasurer of the Philanthropic Society, and to restrain him from proceeding to collect money in that character, after two insufficient answers, an order was made on petition, that the cause should be set down, in order that the information should be

(*i*) *Attorney General* v. *St. John's College*, V. C. 19 Jan. 1835, 4 Law Journ. N. S. 72—77.

(*k*) *Ward* v. *Cooke*, 5 Madd. 122.

(*l*) *Wynne* v. *Callander*, 1 Russ. 293.

(*m*) *Attorney General* v. *Corporation of Carmarthen*, Coop. C. C. 30. Generally speaking, the Court of Chancery will not interfere with regard to the misapplication of money belonging to a corporation; *S.C.* ibid.; nor is it a ground for a criminal information to be granted by the Court of King's Bench. *Rex* v. *Watson & others*, 2 T. R. 200.

(*n*) *Attorney General* v. *Merchant Taylors' Company*, 1 Mylne & Keen, 189; *S. C.* 5 Sim. 288.

taken *pro confesso*, the lord chancellor said that he could not then do otherwise than decree the information to be taken *pro confesso*; if it ought not to be done, an application ought to be made to discharge the order for setting it down to be taken *pro confesso*; the costs followed of course, but only to that time (*o*).

If the attorney general do not put in an answer to a bill filed against him, within a reasonable time, the court will order, that unless the answer be put in by a short day, the bill be set down to be taken *pro confesso* (*p*).

Where an information charges that the defendants, the trustees of a charity, have deeds in their possession, and they admit it in their answer, an order may be obtained for leaving such deeds and papers with the clerk in court in the cause, with liberty for the relators, their solicitors, or agents, to take copies and extracts from them at their own expense (*q*).

(*o*) *Attorney General* v. *Young*, 3 Ves. 209. See 1 Eq. Abr. 179, pl. 5. *Hawkins* v. *Crook*, 2 P. Wms. 556. *Davis* v. *Davis*, 2 Atk. 21; *Jopling* v. *Stuart*, 4 Ves. 619.

(*p*) *Peto* v. *Attorney General*, 1 Younge & Jerv. 509.

(*q*) *Attorney General* v. *The Dean and Chapter of St. Paul's*, Reg. lib. A. 1833; fol. 1024. *Attorney General* v. *The University of Cambridge*, Reg. lib. A. 1833, fol. 1253; *Attorney General* v. *Lowndes*, Reg. lib. A. 1833, fol. 1171. See 4 Ves. 66; 5 Madd. 16; 1 Sim. & Stu. 309; 5 Sim. 409, 552; 1 Younge, 280; 1 Mylne & K. 88; 2 Sid. 35.

The following order was made in another cause, "that the defendants do produce at the hall of the Goldsmiths' Company, in the city of London, the several deeds, wills, books, papers and other documents, relating to the matters in question, in this cause comprised in the three schedules to the said defendants' answer, and which documents are admitted by the said defendants to be in their custody or power; and it is ordered that the defendants be at liberty to seal up such parts of the before-mentioned documents as, according to an affidavit previously to be made by the clerk of the said defendants, do not relate to the charities in question in this cause; and it is ordered that the relators, and their solicitor, be at liberty to inspect and peruse the same, and take copies of and extracts from the same, or any of them, as they may be advised, and at all seasonable times, giving reasonable notice thereof, at the relator's expense; and it is ordered that the same be produced in this court, at the hearing of this cause. *Attorney General* v. *Wardens and Commonalty*

The master is to exercise the discretion given him by the 60th order, to determine what books or papers shall be produced by the trustees of a charity estate, though the order or decree under which he is proceeding requires the parties to produce on oath *all* books and papers (*r*).

An application for a re-hearing of a charity cause should be made by petition, and not by motion (*s*).

Where a legacy has been carried over by an order of the court to the account of a charity, the question as to the validity of the bequest cannot be argued, on a petition for payment of the legacy, but a petition for re-hearing the cause must be presented (*t*).

Where a decree on default was made for setting aside a lease of a charity estate, with covenant for perpetual renewal, and directing an account of the actual rent, a re-hearing upon the application of the defendant was allowed upon his paying the relators' costs, and the previous costs in the master's office, without disturbing the proceedings before the master, as to the draft of a report of what was due, but the money was not to be paid into court before the report was made (*u*).

An application to suspend proceedings under a decree, against which there was an appeal, until it had been heard,

of Goldsmiths, Reg. lib. A. 1832, fol. 433. See *Attorney General* v. *Clothworkers' Company*, Id. fol. 378.

(*r*) *In re* of the parishes of Llantrisant, &c., 1 Russ. & M. 25. The words of the 60th order are, "that where by any decree or order of the court, books, papers, or writings are directed to be produced before the master for the purposes of such decree or order, it shall be in the discretion of the master to determine what books, papers, or writings are to be produced, and when and how long they are to be left in his office; or in case he shall deem it necessary that such books, papers, or writings, should be left or deposited in his office, then he may give directions for the inspection thereof by the parties requiring the same, at such time and in such manner as he shall deem expedient." 2 Russ. 21.

(*s*) *Attorney General* v. *Brooke*, 18 Ves. 319. See *Cunningham* v. *Cunningham*, Ambl. 89; *Kinsay* v. *Kinsay*, 1 Dick. 145.

(*t*) *Bradshaw* v. *Tasker*, 2 Mylne & K. 223.

(*u*) *Attorney General* v. *Brooke*, 18 Ves. 319.

was refused in the case of a charity in a course of actual distribution, to endure only for the life of the plaintiff, where attending to the probable duration of her existence, the consequence of suspending the proceedings would, in the event of her death, before the appeal was heard, have caused the utter disappointment of the exercise of the discretion given to the plaintiff; and the judgment below appeared to be right, and the pecuniary circumstances of the plaintiff did not authorise an inference that if a wrong distribution were made, that she would not be able to furnish the means of setting it right. Such an application, when it does not succeed, is generally, almost universally, liable to the costs (*v*).

11. *Of the accounts which will be directed of charity estates.*] The general principle is, that unless there is a fair and reasonable explanation given, the account against the trustees of a charity shall be taken from the time when an inexcusable misapplication of the trust fund commenced.

Defendants in a charity suit cannot have the same benefit from length of time, or *laches* in calling them to account, which defendants, in other cases, might successfully contend for: there is no fixed limit within which an account against a trustee of a charity must be confined; but in each case the court is guided by the particular circumstances.

When the Court of Chancery limits an account of the rents and profits of charity estates to the time of filing the information, or to six years before that date, it does not act with reference to the statute of limitation (*w*). The principle

(*v*) *Waldo* v. *Caley*, 16 Ves. 214, 215. See *Willan* v. *Willan*, Id. 216; *Burke* v. *Browne*, 15 Ves. 184.

(*w*) By stat. 3 & 4 Wm. IV., c. 27, s. 42, it is enacted, "that after the thirty-first day of December, one thousand eight hundred and thirty-three, no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of

upon which it proceeds is, that it will not deal harshly with men, who meaning to discharge their duty faithfully, have nevertheless mistaken it (*x*).

With respect to the general principle on which the court deals with trustees of a charity, though it holds a strict hand over them, when there is wilful misapplication, it will not press severely upon them where it sees nothing but mistake. It often happens, from the nature of the instruments creating the trust, that there is great difficulty in determining how the funds of a charity ought to be administered. If the administration of the funds, though mistaken, has been honest, and unconnected with any corrupt purpose, the court while it directs for the future, refuses to visit with punishment what has been done in time past. To act on any other principles would deter all prudent persons from becoming trustees of charities (*y*).

Where there is a trust of a charitable nature, and it is matter of difficulty to know the exact meaning of the instruments creating it, or to determine who are the *cestuis que* trusts, it has never been the habit of the Court of Chancery to call on those who have for a long time acted in the management of the trust mistakenly, and not corruptly, to account for what passed before the filing of the information. The hardship of the contrary rule would be extreme (*z*).

the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent: provided nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in possession or receipt as aforesaid, although such time may have exceeded the said term of six years."

(*x*) *Attorney General* v. *the Mayor of Exeter*, 2 Russ. 367.

(*y*) *Per Lord Eldon, Attorney General* v. *the Corporation of Exeter*, 2 Russ. 54.

(*z*) *Per Lord Eldon, Attorney General* v. *the Corporation of Exeter*, 2 Russ. 50.

In the *Attorney General* v. *Owen* (*a*), Lord *Eldon*, in setting aside an improvident lease of a charity estate, would not charge the defendant with any rent beyond that reserved for any period prior to the filing of the bill; but intimated that in future persons taking such leases would not be let off so easily. In another case of the same kind, the account of all benefits made by the defendants was granted from the time of filing the information or a previous demand, if any appeared (*b*).

Lord *Loughborough* appears to have thought, even where the parties were willing to take a limited account, that he was bound to decree a general account of rents (*c*).

But Lord *Eldon* thought, that although an account might be directed generally against a party who had been guilty of great mismanagement, yet it might be confined, if expedient, to the time of filing the information (*d*).

Sometimes the court has been influenced by prudential motives, with respect to the interests of the charity, in directing the time for which the account shall be prosecuted (*e*).

A governor of a charity, who had taken a lease, was directed to be charged with the full value of the property, if it was more than the reserved rent (*f*).

Where the testator had fixed the amount of the salaries to be paid to the master and usher of a school, and the trustees, upon an increase of the income of the charity, had augmented the salaries upon their own responsibility, Sir *T. Plumer*, M. R. on exceptions to the master's report, would not allow the trustees any thing beyond the fixed salaries; and held that the surplus ought to have been expended for the benefit of the scholars, in providing them with books, paper, and other necessary articles; and if a surplus remained after that, a scheme should have been laid before the master for its application; for the court would not sanction an excess of

(*a*) 10 Ves. 561.

(*b*) *Attorney General* v. *Griffith*, 13 Ves. 580.

(*c*) *Attorney General* v. *Bowyer*, 5 Ves. 300.

(*d*) *Attorney General* v. *Dixie*, 13 Ves. 537, 538.

(*e*) *S. C.* Ibid. 533.

(*f*) *Attorney General* v. *Earl of Clarendon*, 17 Ves. 500.

trust, nor hold out to trustees a latitude of giving more than the founder had fixed (*g*).

But Lord *Eldon*, on appeal, thought it was not a case in which the dean and canons of *Christchurch* ought to be called on to make good the difference between the salaries actually paid and those mentioned in the will, which admitted of much difficulty in the construction. It merely directed the trustees to appoint a master and usher, and to pay to them certain salaries; but not a word was said as to the particular manner in which the school was to be constituted. The college did not consider that the school was to be a free grammar-school, in which they were in error: for the court decreed that the school was to be a free grammar-school, and it was not sought to disturb that declaration. His lordship thought, that the direction in the will that the master and usher should have certain sums a year, was not such a declaration as would make the allowance of larger salaries an abuse of the charity. The will did not contain any prohibition against increasing the salaries of the masters. The trustees were not only to constitute the school, but to order and direct the management of it; and it could not be inferred from the direction that the master and usher should have certain annual sums—that the trustees were not, under any change of circumstances, to increase those salaries. It appeared that the trustees had merely acted on an erroneous notion; and if there be a fair and honest intention on the part of those who have the management and direction of a charity, it is not the habit of the court, though that intention should be founded in mistake, to hold trustees responsible for acts so done, or to call back money so paid. It was therefore held that the master was right in allowing the increased salaries which had been paid by the trustees (*h*).

The account of rents against trustees is not always confined to the period of a demand having been made, or the information filed, but is sometimes extended and carried back

(*g*) *Attorney General* v. *Dean and Canons of Christchurch*, Jac. Rep. 637.

(*h*) *S. C.* 2 Russ. 321; Jac. Rep. 474.

to the time of the creation of the trust, which the information seeks to carry into effect. Where a testator, by his will dated 21st February, 1610, devised lands to the *Brewers' Company* and their successors, upon trust, from time to time, to employ, disburse, and bestow all the rents and profits (which he required to be improved to the best value) of the premises (40*s.* thereof yearly only excepted) for repairing and amending the highway between *Tyburn* and *Edgware*, in *Middlesex*, from time to time, yearly for ever, at the discretion of the company, to whom the testator gave 40*s.* yearly for their pains.

By an act of parliament 19 Geo. III., (continued by another act, 39 Geo. III.), for repairing a road, comprising part of the line of road described in the testator's will, among various powers vested in the trustees thereby appointed, it was enacted that "all lands, tenements, and hereditaments, and all rents, &c. issuing out of lands, &c. which then were, or thereafter should be, liable to the repairs of the said road; and all owners and occupiers thereof, &c. should remain liable and chargeable to and with the repairs thereof, as they were before the passing of the said act;" and the proprietors of such lands were thereby required "to pay such sum or sums of money as should be liable to be paid out of, or chargeable upon, such lands, &c. as aforesaid, to such person or persons as the said trustees, or any five of them, should appoint to receive the same; and upon default of payment, the same should be levied and recovered in such manner as the penalties and forfeitures imposed by the said act were thereinafter directed to be levied and recovered."

The *Brewers' Company* entered into the possession of the devised premises on the death of the testator, and had continued in the receipt of the rents (which amounted to 148*l.* 10*s. per annum*); and at different times, on the application of the trustees of the roads, paid to them such sums as were necessary to put them in condition. On an information at the relation of the trustees of the roads against the *Brewers' Company* for an account of the rents of the lands in question, a decree was made for an account of the rents, from the time

when an application had been made to the company; but, upon a rehearing, the master of the rolls said, "that it was a point which had never yet been decided; from what period a corporate body should be bound to account in matters of trust, but that the original decree was clearly wrong, as no trustee can be competent to say he will account only from the time at which a demand is made; and that to give the account only for six years, would be to create an analogy between a trust account and a common account. That in this case, previous to the passing of the acts of parliament, the company were bound to apply the rents and profits of the estates, without being called upon to do so, and the attorney general might, at any time, have sued them for that purpose; but when the act was passed, it was not meant to have a restrospective operation. The trustees, under that act, could not say they had a right to the accumulated fund from any antecedent period; and the attorney general, suing at the relation of those trustees, could have only such an account as the trustees themselves would be entitled to. The account of the rents and profits was therefore directed to be taken "from the usual day of payment of such rents, next after the passing of the act 19 George III. to that time"(*i*).

In the *Attorney General* v. *The Corporation of Stafford* (*k*), which was an information for the due administration of certain tithes vested in the corporation for charitable uses, and large portions of the fund had been applied to purposes not warranted by the nature of the charity, such as contributing towards building the shire hall. The corporation in their answer rendered accounts which went back as far as 1791; a decree for an account having been made against the corporation, it was held on a question from what time the account should be decreed, that it ought to commence at the date at which the accounts set forth in the schedules to the answer began, for it was impossible to say that many questions might not arise with respect to the manner

(*i*) *Attorney General* v. *Brewers' Company*, 1 Mer. 495.

(*k*) 1 Russ. 547.

in which the sums mentioned in the accounts had been applied (*l*).

An account of the rents and profits of a charity estate has been decreed for a period of 200 years against a corporation who, by their answer, admitted the receipt, and stated that they had from time to time debited themselves in their books with the amount. Thus where freehold lands in the year 1609, were conveyed by *Nicholas Spicer* to trustees upon trust, for the yearly payment of 40*s*. worth of bread, to be distributed to the poor of the city of *Exeter;* of 20*s*. towards the repair of certain parish churches; of 40*s*. towards lighting the city; and of 6*s*. 8*d*. to the night bellman. The residue of the issues and profits was to be lent in sums of from 10*l*. to 21*l*. for four years, upon good security, to such of the freemen of the city of *Exeter* as the mayor and aldermen should think fit, and some small annual payments were to be made to several of the officers of the corporation. On the 20th August, 1629, the surviving trustees conveyed the lands by feoffment to the corporation of *Exeter*, who from that time had been in the receipt of the rents and profits of the charity estate.

In 1811 an information was filed against the corporation of *Exeter*, praying that an account might be taken of the rents and profits of the charity estates received by them, and that proper directions might be given for establishing the charity.

The defendants by their answer admitted, that they and their predecessors had for a long time been in possession of the premises, having always considered themselves so pos-

(*l*) In taking accounts before the master, the accounting party is first charged with what he admits, or is proved to have received; and he afterwards discharges himself by stating and proving his payments, to substantiate which, he is required in the master's office to produce vouchers for every payment exceeding 40*s*. The discharge, which is the defendant's account of payments, is first proceeded upon on warrants. If questions arise with regard to particular items, they are then generally the subject of separate warrants, on which the master is attended.

sessed upon the trusts, and for the charitable purposes contained in the conveyance of 1609, and had applied considerable parts of the rents and profits to those purposes. There had been every year some residue or surplus, the amount of which they believed would appear from the books of account of the charity, and they had always been ready and willing, upon proper application being made to them, to lay out and apply such surplus rents and profits agreeably to the purposes of the charity, but no such application had been made to them. It had therefore been retained by them, or by certain members of their body appointed to be trustees or curators of the charity, to their own uses; and they had from time to time duly charged themselves, in their books of account, with the sums so retained by them, and were willing to account for the same as the court should direct. The estates had been let at low rents, with large fines, which had been received by the persons appointed to be trustees or curators of the charity, and duly brought to account as part of the rents and profits applicable to the purposes of the charity: and they referred to their books of account for the amount of the fines so received. They had out of the rents and profits, paid the specific annual sums directed by the founder, but had employed very little in the advance of money on loan. They denied any abuse, unless the court should be of opinion, that they or their predecessors, by borrowing the surplus rents and profits, which, for the reasons aforesaid, could not be applied to the purposes of the charity (always charging themselves as debtors for the amount), had been guilty of any abuse.

The decree made by the master of the rolls, on the 22nd March, 1813, (without any discussion at the bar), directed an account of the rents and profits of the estates, and the fines taken for the renewal of leases, come to the hands of the defendants, or of any person or persons for their use; and the master was to state, at what times such fines were received, and in what manner the same and the rents and profits had been applied. The master, as no date was expressed at which the account was to commence, carried it

back to 1629, the time when the corporation first entered into possession of the estates.

On a rehearing before Sir *T. Plumer* he observed, "The defendants object to the account as directed by the decree, but they do not state to what period it ought to extend. Supposing the case of trustees called on to account for the receipts of two or three hundred years, who admit the receipt and say that they have conscientiously laid up the money, and that they have it ready for the charity, or that they have invested it in the funds or in land, unmixed with other money, what is the court then to do? Can the court give to the trustees a part of the money, or the land which they acknowledge not to be theirs? It is admitted to belong to the charity, and the charity must have it. There is no difficulty from complicated accounts; all the topics of hardship that may sometimes be urged, fail of application to such a case.

"Now let us see whether this case does not in substance amount to that which I have put. The defendants have, in their answer, very honourably and fairly disclosed the truth, acknowledging that they took upon themselves the situation of trustees, and received the rents and profits of the estates. They say that no applications being made to them for loans, they applied only a small part to the purposes directed by the testator. It is obvious then that there must have been a considerable surplus. It is not alleged that the corporation themselves had any right to it; then what became of it? As I understand the answer, the defendants take considerable credit to themselves for having recorded their receipts in their books, charging themselves as debtors for the amount of the surplus, as having borrowed it of the charity. The amount, they say, will appear from their books; and they have always been willing to account for it. They have always considered themselves liable to account without limit or stint: there is not a word that points at any period or limit: they do not allege that there is any period beyond which their books do not extend. How then is it possible for the court to fix a limit which the defendants do not ask for? Is the court to force them to be unjust? The account

directed must be commensurate with the admissions of the answer; and, in point of fact, the difficulties supposed to exist have been got over, the account having already been taken" (*m*).

The defendants appealed against the decree, insisting that the accounts ought not to have been directed to be taken from any period more distant than the filing of the information; and, at all events, that the corporation ought not to have been charged in respect of the surplus rents admitted to have been retained by them, so far as the purposes, to which the same were stated to have been applied, were public and charitable purposes for the advantage of the city of *Exeter* and its inhabitants, although not strictly within the scope and intention of the indenture of 1609.

Lord *Eldon*, after stating that a more limited account was often directed, said, it is quite a different matter where the defendants state in their answer, that they have borrowed the charity funds for other purposes, have kept an account of the funds so borrowed, and have from time to time debited themselves with the amount. In such a case, it would be very difficult to say that the account could be limited, either to the filing of the information, or to six years prior to that time; because the very reason for which, under different circumstances, either of these periods is selected by the court, is negatived by the defendants' own statement.

The difficulty of taking an account from a remote date is one of the considerations which has influence on the court in determining where the account shall begin. But such a difficulty cannot exist when the parties called upon to account allege in the pleadings that the account has been regularly kept (*n*).

Where a corporation follow the practice of their predecessors, in the application of the profits of charity estates, and no wilful breach of trust or improper motive is imputed to them, the account will not be carried back beyond the

(*m*) *Attorney General* v. *the Mayor of Exeter*, Jac. 443—450.

(*n*) *Attorney General* v. *the Mayor of Exeter*, 2 Russ. 367.

time when they had notice that the propriety of such an application was questioned. But where the charity estates have been alienated, though at a very distant period, the corporation will be made to compensate the present value of the lands so alienated, out of such general property of the corporation as was not devoted by the donors to other special purposes. And it will be referred to the master to inquire what real and personal property the corporation were possessed of or entitled to, at the time of the filing of the information, and at the time the inquiry was directed, which was not granted or devised to the corporation upon any special trust. And, in consequence of a suggestion that an attempt had been made to defeat the object of the information, the master was directed to state all the circumstances respecting the alienation of any real and personal estate by the corporation, between the time of filing the information, and the master's inquiry (*o*).

In the case of a charity for the maintenance of a select number of alms people, notwithstanding there are not persons in a parish sufficient to answer the description of the charity; yet the land charged with the payment of the charity, is not discharged during that time, but the arrears shall accumulate and be applied towards the advancement and increase of the charity. The owner of lands charged with an annuity for the maintenance of a schoolmaster will not be excused from the payment of it on account of there having been a vacancy, but must pay all the arrears (*p*).

So on an information to recover an annuity of 16*l.* a-year charged on an estate as a salary for a clergyman for preaching a sermon in a particular chapel, and for teaching poor

(*o*) *Attorney General* v. *Corporation of East Retford*, 2 Mylne & Keen, 35; *Attorney General* v. *Mayor of Dublin*, 1 Bligh, N. S. 355. In the *Attorney General* v. *Corporation of Newbury*, Reg. lib. A. 1833, fol. 818, an inquiry was directed as to the property possessed by the corporation for paying a balance found due from them. See *Attorney General* v. *Corporation of Exeter*, 3 Russ. 398, where the court reversed a decree directing an inquiry into the property of the corporation and the production of their title deeds.

(*p*) *Aylet* v. *Dodd*, 2 Atk. 238.

children; it was held to be no defence, that there was no person answering the description of the charity, and an account of the arrears of the annuity was decreed, and proposals directed to be received for the direction of the charity (*q*).

It was held by Lord *Hardwicke*, that colleges should not be obliged to account so strictly and so far back as common persons, because colleges are a various fluctuating body who receive their revenues for their daily maintenance and support, to eat, and drink, and maintain the college; and the money being used, and the persons who applied it being dead, the court would not allow money to be recalled by parties who had acquiesced under proceedings for above forty years, on their subsequently seeking to set them aside. Therefore a decree was made for an account from the time of filing the information upon the footing of the decree complained of. But the court would not allow money which should have been applied for exhibitions to go to the benefit of a college as a surplus, though it would not have taken notice of any small vacancy, as for a month or two (*r*).

Where one member of a college filed an information claiming a fellowship, to which another person had been elected, and prayed that the fellow in possession might make full and adequate satisfaction for the profits which had been made of the fellowship during his possession, Lord *Hardwicke* said, supposing the master and fellows had innocently erred in the construction of the statutes in electing a fellow, it would be a great absurdity in the case of a poor provision, to make a fellow account for commons, &c., which he might have eaten upon an imagination that he had a right to them (*s*).

Where a college under powers given by a charter appointed one of their fellows master, and another fellow usher of a school, for whom there was no occasion on account of the small number of scholars, with a yearly salary; and it

(*q*) *Attorney General* v. *Bolton*, 3 Anstr. 820.

(*r*) *Attorney General* v. *Baliol* 3 Atk. 675.

(*s*) *Attorney General* v. *Talbot*, *College, Oxford*, 9 Mod. 407. 5th ed.

appeared in evidence, that the usher never did any thing at the school, but constantly resided at his college, and that the master received the whole of his salary; the court held, that it was a contrivance to make the school a sinecure, and decreed the master to account for the usher's salary for fifteen years, all the time it had been received, not to the usher, but for the benefit of the charity (*t*).

12. *Of costs relative to charities.*] We have already adverted to costs of commissions of charitable uses (*u*), and of petitions to the lord chancellor as visitor in right of the crown (*v*). We now proceed to the consideration of costs incurred in other proceedings relative to charities. The rules with respect to the costs of trustees of charities being for the most part the same as those of trustees for other purposes, it will be necessary to allude to cases of the latter description.

The office of a trustee is considered as honorary, and not undertaken from mercenary motives (*w*); therefore, trustees are not entitled to any allowance for their trouble in managing the trust estate, unless the instrument creating the trust contains a direction for that purpose (*x*); or the trustees, previously to undertaking the trust, have stipulated, with the consent of the court, for some compensation for their time and trouble (*y*).

So if a trustee is a solicitor, he cannot charge professionally for managing the trust, but is merely entitled to his costs out of pocket (*z*).

But it is in the nature of the office of a trustee, whether expressed in the instrument or not, that the trust property shall reimburse him all the charges and expenses incurred in

(*t*) *Attorney General* v. *Corporation of Bedford*, 2 Ves. sen. 505.
(*u*) *Ante*, p. 287.
(*v*) *Ante*, p. 342.
(*w*) 2 Atk. 60, 406.
(*x*) *Ellison* v. *Airey*, 1 Ves. sen. 114; *Robinson* v. *Pitt*, 3 P. Wms. 251.
(*y*) *Marshall* v. *Holloway*, 2 Swanst. 453; *Brocksopp* v. *Barnes*, 5 Madd. 90. See 2 Atk. 60.
(*z*) *New* v. *Jones*, 9 Jarm. Conv. 338.

the execution of the trust (*a*), where no breach of it has been committed (*b*). So trustees will be allowed all reasonable sums which they have actually paid to agents in the management of the property (*c*). Trustees who have acted fairly, and with such diligence as would have been expected from a provident owner in the management of his own property, are also entitled to receive the amount of costs incurred by them in proceedings relative to the trust estate, either at law or in equity (*d*).

Trustees should apply for their costs at the hearing of the cause, when the subject is regularly before the court; for although a trustee who did not appear at the hearing of a cause, on setting it down again was allowed his costs, it was upon condition of paying the costs of the day on the former hearing (*e*); and it does not appear that costs will be allowed to trustees as a matter of course, on an application after a decree has been actually made (*f*).

It was laid down, that where there was such a dereliction of duty on the part of executors as obliged the court to charge interest upon balances in their hands, the same principle calls upon the court to compel the payment of costs (*g*). But this general rule was qualified by Sir *W. Grant*, M. R., who said there might be many cases in which executors must pay interest, which would not be cases for costs (*h*). It does not therefore follow that in all cases where an executor is directed to pay interest, he must also pay costs. Where

(*a*) *Worrall* v. *Harford*, 8 Ves. 8; *Dawson* v. *Clarke*, 18 Ves. 254.

(*b*) *Anon.* 12 Mod. 560.

(*c*) *Bonithorn* v. *Hockmore*, 1 Vern. 316; *Macnamara* v. *Jones*, 2 Dick. 587; *Forrest* v. *Elwes*, 2 Mer. 69; *Henderson* v. *M'Ivor*, 3 Madd. 275.

(*d*) *Jones* v. *Lewis*, 1 Cox, 199; *Harley* v. *Phillips*, 2 Atk. 48; *Hide* v. *Heywood*, 2 Atk. 125; *Attorney General* v. *City of London*, 1 Ves. jun. 246; *Sammes* v. *Rickman*, 2 Ves. jun. 36; *Whistler* v. *Newman*, 4 Ves. 129; *Pocock* v. *Reddington*, 5 Ves. 794.

(*e*) *Norris* v. *Norris*, 1 Cox, 183.

(*f*) *Colman* v. *Sarell*, 2 Cox, 206.

(*g*) *Mosley* v. *Ward*, 11 Ves. 581; *Seers* v. *Hind*, 1 Ves. jun. 294.

(*h*) *Ashburnham* v. *Thompson*, 13 Ves. 404.

a suit was necessary for determining what construction was to be given to a will, the costs of so much of the suit as related to that were not charged on the executors, although they were held liable to pay all the costs of the inquiries as to the arrears of rent and balances in their hands, such inquiries having been solely occasioned by their breach of trust (*i*).

The costs in such cases will depend upon the circumstances of each particular case; and an executor or trustee who retains a balance in his hands will not be charged with the costs of the suit, except under circumstances of considerable misconduct, and where a suit is instituted with unnecessary haste against a trustee who has not misconducted himself, he will be allowed his costs (*k*).

So, although a purchase of the trust property by a trustee for his own benefit will be set aside, the court will not visit him with the costs of the suit, where the transaction is free from any imputation of fraud (*l*).

A trustee, seeking the direction and indemnity of the court as to the execution of his trust, is, whether plaintiff or defendant, entitled to his costs; unless the act required to be done leads to no responsibility, and the motive of the trustee is obviously vexatious (*m*).

Where the suit is occasioned by the neglect of the trustee (*n*), as in not keeping accounts (*o*), or is not necessary for the due execution of the trust, he will not be allowed costs (*p*).

A trustee, who had refused to pay a legacy without the direction of the court, in a case which admitted of no doubt, was refused his costs, but was not made to pay the costs of

(*i*) *Tebbs* v. *Carpenter*, 1 Madd. 290. See *Raphael* v. *Boehm*, 13 Ves. 590; *Sanderson* v. *Walker*, ibid, 601; *Caffrey* v. *Darby*, 6 Ves. 488.

(*k*) *Bennett* v. *Atkins*, 1 Younge & Collyer, 247.

(*l*) *Baker* v. *Carte*, 1 Younge & Collyer, 250.

(*m*) *Curteis* v. *Candler*, 6 Madd. 123.

(*n*) *O'Callaghan* v. *Cooper*, 5 Ves. 117.

(*o*) *Pearse* v. *Green*, 1 Jac. & Walk. 135.

(*p*) *Packwood* v. *Maddison*, 1 Sim. & Stu. 234.

the suit, because he might have acted from ignorance, and not from any improper motive (*q*).

A trustee who, by his refusal to concur with the vendor in conveying an estate to a purchaser, occasioned a suit, was ordered to pay all the costs (*r*).

Where a trust estate descended to one who refused to execute a conveyance to the *cestui que trust*, after it had been approved by his solicitor, unless he were paid a sum of money, the court ordered the conveyance, with costs against the defendant, on a bill filed to compel the conveyance (*s*).

The court has allowed the expense of obtaining acts of parliament which the legislature has thought proper to pass, although the sanction of the court had not been previously obtained: for it could not with any propriety dispute the prudence of measures which the legislature had adopted (*t*).

But trustees, desirous of obtaining an act of parliament for regulating a charity, ought to have the sanction of the Court of Chancery: for they will not be allowed the costs of an unsuccessful attempt to obtain an act of parliament, to enable them to administer the property of the charity on an improved plan, though their failure may arise from accidental circumstances, and their motives may be fair and proper (*u*).

Where trustees are visitors of a school, they must generally superintend it, and perform the duty *bonâ fide;* in which case they will be at liberty, like any other trustees, to charge the expenses fairly incurred in the execution of their trusts (*v*).

And where the sum allowed to the visitor by the deed of foundation was so small as not to induce him to exercise his visitatorial power, Lord *Hardwicke* intimated that it might be augmented (*w*).

(*q*) *Knight* v. *Martin*, 1 Russ. & Mylne, 70.

(*r*) *Jones* v. *Lewis*, 1 Cox, 199.

(*s*) *Watts* v. *Turner*, 1 Russ. & Mylne, 634.

(*t*) Case of *Downing College*, cited 2 Russ. 519.

(*u*) *Attorney General* v. *The Earl of Mansfield*, 2 Russ. 501, 518.

(*v*) *Attorney General* v. *The Dean and Canons of Christchurch*, Jac. Rep. 487.

(*w*) *Attorney General* v. *Price*, 3 Atk. 108.

Where the founder of a grammar-school had directed the yearly sum of 10*l.* to be paid to the master and wardens of a company for their labour and pains in visiting the school, and the rents of the lands given for the support of the school had greatly increased in value, by a new scheme for the regulation of the charity, approved by the court, 200*l.* a-year was directed to be allowed to the company for the expenses of the annual visitation of the school by the master and wardens of the company. In this case, the company having been declared a trustee as to the increased income of part of the property, and beneficially interested in the other part, subject to certain specified payments, it was declared that the annual sum of 200*l.* should be apportioned and paid out of the two estates, according to their relative annual value (*x*).

A trustee, misbehaving himself, will be ordered to pay costs out of his own pocket (*y*). So the governors of a free-school, who had been extremely negligent in the execution of their trust, were punished with part of the costs, although they had not been guilty of corruption (*z*).

Trustees for charities are not further chargeable than any other trustees are, who are only liable for their own receipts, except in cases of fraud or gross negligence (*a*). But such trustees shall be chargeable in like manner with any other trustees, whether they be private individuals or a public company: for when the latter, being trustees for a charity, have mismanaged the fund and neglected the objects, they will be decreed to pay the costs of the original suit, and part of those of the appeal (*b*).

A corporation, whose conduct has given occasion to the suit, will be ordered to pay costs (*c*). A corporation, nominating a schoolmaster contrary to the particular tenor of their charter, are liable to costs (*d*.)

(*x*) *Attorney General* v. *Skinners' Company*, 2 Russ. 407, 446, 7.

(*y*) *Loyd* v. *Spillet*, 3 P. Wms. 344.

(*z*) *East* v. *Ryal*, 2 P. Wms. 284.

(*a*) *Man* v. *Ballet*, 1 Vern. 44; *Keble* v. *Thompson*, 3 Br. C. C. 112; 11 Ves. 252; 16 Ves. 477.

(*b*) *Haberdashers' Company* v. *Attorney General*, 2 Br. P. C. 370, 2nd ed.

(*c*) *Attorney General* v. *Corporation of Stafford*, Barnard. 33.

(*d*) *The Town of Salop* v. *Attorney General*, 2 Br. P. C. 402, 2nd ed.

So a corporation, being trustees of a charity and in possession of the charity estate, and suppressing or concealing any evidence relating to the charity, are liable to the costs of the suit (*e*).

It is the duty of a corporation, when apprised by an information against them of the nature and extent of the claims made upon them, to cause a diligent examination to be made, before they put in their answer, of all deeds, papers, and muniments in their possession or power, and to give in their answer all the information derived from such examination; and if they pursue an opposite course, and in their answer allege their ignorance upon the subject, and the information required is afterwards obtained from the documents scheduled to their answer, the court will infer a disposition on the part of the corporation to obstruct and defeat the course of justice, and on that ground alone will charge them with the costs of the suit (*f*).

A company, in which a charitable fund was vested, were ordered to pay the costs of an information, except those which were incurred by the necessity of settling a new scheme, where the charity had fallen into desuetude by the neglect of the company, and their general estate had profited by the nonapplication of the fund for a long series of years (*g*).

A company, in whom an estate was vested as trustees of a charity, who claimed a larger balance than in the result was found due to them, was deprived of their costs, on account of their attempt to overcharge the charity funds (*h*).

Trustees of charities have frequently been ordered, not only to account for charitable property which has been lost or misapplied, but on being removed from the trusts on account of their misconduct, directed at their own expense to convey the property to new trustees (*i*).

The House of Lords, on reversing an order made upon a

(*e*) *Borough of Hertford* v. *Poor of Hertford*, 2 Br. P. C. 377, 2nd ed.

(*f*) *Attorney General* v. *the Corporation of East Retford*, 2 Mylne & Keen, 35.

(*g*) *Attorney General* v. *the Mercers' Company*, 2 Mylne & Keen, 654.

(*h*) *Attorney General* v. *Brewers' Company*, 1 P. Wms. 376.

(*i*) *Mayor of Coventry* v. *Attorney General*, 7 Br. P. C. 235, 2nd ed.; *ex parte Greenhouse*, 1 Madd. 108.

petition in a matter which ought to have been the subject of an information, would not allow costs to either side, both having been equally culpable, and the conduct of the corporation such as not to entitle it to costs (*k*).

But where trustees and a corporation were deprived of the administration of a charity, the costs of the relators were directed to be paid out of the funds of the charity, without giving any costs to or against the defendants, because they had not fallen into wilful error, but had merely adopted the line of conduct pursued by their predecessors for a century (*l*).

Where trustees of a charity were made, as individuals, defendants to a suit for the administration of the charity, and afterwards the information being amended, they were made defendants in their corporate capacity; but the suit was not dismissed against them as individuals; at the hearing, the record was considered as constituting two different causes; and the cause against the trustees as individuals being unnecessary, was dismissed with costs, though in the cause against them in their corporate capacity, a decree was made remedying abuses which had grown up in the charity, and regulating its future administration (*m*).

Where a town clerk had been made a party to a bill for the purpose of discovery, Sir *John Leach*, M. R., inclined to think that the corporation must pay the costs of the town clerk, but an inquiry was directed as to the practice (*n*).

Where the costs of a trustee are directed to be taxed, that means, as between party and party, not in the larger way between solicitor and client; but where a trustee in the fair execution of his trust, has expended money by reasonably and properly taking opinions, and procuring such directions as are necessary for the due execution of his trust, he is entitled

(*k*) *Corporation of Ludlow* v. *Greenhouse*, 1 Bligh, N. S. 94.

(*l*) *Attorney General* v. *Corporation of Newbury*, Reg. lib. A. 1833, fol. 818.

(*m*) *Attorney General* v. *the Earl of Mansfield*, 2 Russ. 501.

(*n*) *Attorney General* v. *Corporation of Berwick-upon-Tweed*, Taml. 249.

not only to his costs, but also to his *charges* and expenses, under the head of just allowances (*o*).

It was decided by Sir *John Leach*, M. R., that a person named in a deed as trustee, who declines to accept the office, is in the same situation as any other defendant against whom a suit is dismissed, and can only have his costs as between party and party (*p*).

So persons nominated trustees by an instrument which being void, passed no trust fund, were not allowed costs as between solicitor and client, because there were no funds in the hands of the trustees, who were trustees of a nullity (*q*).

The attorney general suing in the discharge of his public duty, is never made to *pay* costs (*r*) in a court of equity, but he constantly *receives* costs where he is made a defendant in respect of legacies given to charities (*s*); and where informations are filed in his name on behalf of charities, costs have frequently been awarded him in interlocutory matters independently of the relator.

Upon informations relating to charities, where the merits of the case require it, the constant habit of the court is to subject the defendant to all the costs of the proceeding.

And where an information is filed by the attorney general without naming any relator under the stat. 59 Geo. III. c. 91, s. 1 (*t*), the Court of Chancery has jurisdiction to order a defendant to pay the attorney general his costs (*u*).

Where the attorney general institutes an information at

(*o*) *Fearns* v. *Young*, 10 Ves. 184.

(*p*) *Norway* v. *Norway*, 2 Mylne & Keen, 278. See *Sherratt* v. *Bentley*, 1 Russ. & M. 655, where the same judge is reported to have held the contrary.

(*q*) *Mohun* v. *Mohun*, 1 Swanst. 201.

(*r*) See stat. 24 Hen. VIII. c. 8, 33 Hen. VIII. c. 39, s. 54. *Rex* v. *Corum*, 1 Anstr. 50; *Rex* v. *Miles*, 7 T. R. 367; 2 Fowl. Pr. 371; 3 Bl. Comm. 400.

(*s*) *Moggridge* v. *Thackwell*, 7 Ves. 88. See 1 Sim. & Stu. 397.

(*t*) *Ante*, p. 428.

(*u*) *Attorney General* v. *The Earl of Ashburnham*, 1 Sim. & Stu. 394.

the instance of relators, it is not the ordinary practice of the court to allow him separate costs; the conduct of the cause is with the relators, and they have usually, in all the proceedings, all the costs known to the court. And where in consequence of a suspicion entertained in the master's office of collusion between the relators and the defendant, the same solicitor having appeared for both, and in compliance with a suggestion coming from the master, the attorney general attended the proceedings by a distinct solicitor without the privity or sanction of the court, such costs were not allowed, the master having no power to alter the course of practice or to increase the expenses of the suit. If there be ground for suspecting collusion, application ought to be made to the court, in order that the matter may be put into a course of inquiry (*v*).

Relators on an information upon which abuses in a charity are proved and corrected, are entitled to be allowed not merely costs between party and party, but their costs, charges, and expenses (*w*).

In cases of gross breaches of trust, the relators will sometimes be allowed costs beyond those which are taxed, either by a direction in the first instance to tax them as between attorney and client, or by a reference to the master to see what extra costs they have incurred (*x*).

In charity cases, costs are frequently given as between attorney and client, where no improper point is made; and costs were given to the heir-at-law upon a question as to his right to the produce of real estate, out of which charitable legacies were given, although the court decided against him (*y*).

Where a suit was instituted for carrying a charity into effect, and the court at the first hearing ordered the heir-at-law of the founder to be a party, and under a reference to the

(*v*) *Attorney General* v. *Dove*, Turn. & Russ. 328; *Attorney General* v. *The Corporation of Huntingdon*, cited Id. 329.

(*w*) *Attorney General* v. *Winchester*, 3 Law Journ. Chanc. 64.

(*x*) *Osborne* v. *Denne*, 7 Ves. 425.

(*y*) *Currie* v. *Pye*, 17 Ves. 462.

master to inquire who was such heir, the party found to be heir, by his answer insisted on his right to the surplus rents of the estates, as a resulting trust, the heir was allowed costs as between solicitor and client out of the funds of the charity, although the court decided that the heir had no interest in the property in question (*z*).

So where a suit was commenced entirely for the purpose of establishing charities, and the funds in question were very ample, and the costs of the relators and defendants in such suit had been ordered to be taxed and paid out of the estate, the court, on an application by petition, directed such costs to be taxed as between solicitor and client (*a*).

Although, in a charity case, the court is not bound by the formal relief prayed, but may grant proper relief according to the nature and facts of the case, although not asked for (*b*), yet the terms to be imposed between the parties as to costs are altogether in the sound discretion of the court (*c*).

The relator was allowed his costs, although he had prayed wrong relief, and shaped the whole information with a view to his own demand, which could not be sustained, where directions were given by the court for the regulation of the charity, for in such a case a relator will not be compelled to pay costs (*d*).

Relators have frequently not only been deprived of their own costs, but also ordered to pay costs. Where an information proceeded from a very improper cause, as from a private motive of revenge in the relator, and the court had no jurisdiction to entertain the information, it was dismissed with costs (*e*).

So where a relator totally fails in substantiating the case, no costs can be given to him—the utmost he can then claim

(*z*) *Attorney General* v. *Tonna*, 4 Br. C. C. 177; *S. C.* Beames on Costs, 373.

(*a*) *Attorney General* v. *Carte*, 1 Dick. 113; *S. C.* Beames on Costs, 343.

(*b*) *Ante*, pp. 443—446.

(*c*) *Attorney General* v. *Hartley*, 2 Jac. & Walk. 369.

(*d*) *Attorney General* v. *Bolton*, 3 Anstr. 820.

(*e*) *Attorney General* v. *Middleton*, 2 Ves. sen. 330.

is to be discharged without costs (*f*); but it seems that the court will not give costs out of the funds of the charity, unless a decree be made (*g*).

Where an information is unnecessary, and in contradiction to the rights of the charity as established by charter, the relators must pay costs; "as nothing," observed Lord *Hardwicke*, "is to be more discouraged than the bringing informations colourably for the benefit of the charity, but contrary to the real charity" (*h*); and costs were given against an exceptant, on the ground of his vexatious conduct (*i*).

The relators were charged with the costs of an information, which was dismissed, seeking a specific performance of an agreement between three executors, trustees of a charity, for giving to each a right to nominate to a third part of the charity funds absolutely (*k*).

Where an information was filed, involving most expensive inquiries, containing gross imputations on the conduct of individuals and allegations not proved, upon which no relief was or could be given, the court ordered the costs of all parts of the information, with respect to which the defendants had sustained costs by reason of the allegations of misconduct and abuse of office, to be paid by the relators (*l*).

An information, containing various charges of misconduct against the wardens and governors of a grammar-school, was dismissed with costs to be paid by the relators, as far as it sought to discharge the wardens and governors, and to appoint others, although all the other costs of the information to the hearing were directed to be paid and retained out of the funds of the charity, as between solicitor and client (*m*).

The costs of a suit relating to a charity are, in some cases, ordered to be raised by mortgage. Thus it was ordered that in case the governors of a school should not have a sufficient

(*f*) *Attorney General* v. *Oglender*, 1 Ves. jun. 247.

(*g*) Ibid.

(*h*) *Attorney General* v. *Smart*, 1 Ves. sen. 72.

(*i*) *Aylet* v. *Dodd*, 2 Atk. 230.

(*k*) *Attorney General* v. *Glegg*, 1 Atk. 356; *S. C.* Ambl. 584.

(*l*) *Attorney General* v. *Hartley*, 2 Jac. & Walk. 370.

(*m*) *Attorney General* v. *Earl of Mansfield*, 2 Russ. 501, 538.

sum in their hands to pay the costs of the suit, that they should raise the same by way of mortgage on the net surplus rents of the charity property, after providing for the salary of the schoolmaster (*n*).

In setting aside improvident leases of charity estates, Lord *Eldon*, in refusing to compel the lessees to pay costs, intimated that in future cases of that kind, he should not be prevailed on to refuse payment of costs by the defendants to the relators (*o*); and it may now probably be considered as the general rule, to order the costs of the relators in informations when decrees are made for setting aside such leases, to be paid by the defendants (*p*).

In one case, the lessees were ordered to pay to the attorney general so much of the costs of a suit as related to the setting aside a lease, to be ascertained by the master; and the other defendants, the trustees, to pay the rest of such costs (*q*).

Where the governors of a free school made a long lease for years, of six houses, worth 50*l.* a-year, at a rent of 5*l.*, and the lords commissioners decreed that the assignee should surrender it, and the lessee and governors pay 70*l.* costs, Lord Chancellor *King* affirmed the decree as to surrendering the lease, but mitigated the costs by reducing them to 50*l.*, observing that there was no reason why the charity should pay the costs, but that it was just that the owner of the lease, who was to have the benefit of the breach of trust, should pay costs; and though the governors would gain nothing, and were not guilty of corruption, yet having been extremely negligent in their trust, they ought to be punished with some costs (*r*).

Where a sale, made by the trustees of a charity, consisting

(*n*) *Attorney General* v. *Governors of Atherton (Atherstone) School*, Reg. lib. A. 1833, fol. 1419.

(*o*) *Attorney General* v. *Griffith*, 13 Ves. 565; *Attorney General* v. *Green*, 6 Ves. 452; *Attorney General* v. *Owen*, 10 Ves. 555.

(*p*) *Attorney General* v. *Lord Hotham*, Turn. & Russ. 220, 222; *Attorney General* v. *Lord Ashburnham*, 1 Sim. & Stu. 397; *Attorney General* v. *Ingilby*, V. C. 5 June, 1823.

(*q*) *Attorney General* v. *Gutch*, Reg. lib. A. 1830, fol. 2720.

(*r*) *East* v. *Ryal*, 2 P. Wms. 284.

of a dissenting meeting-house, was set aside, after a considerable lapse of time, that circumstance was allowed to weigh, and the decree against the purchaser was made without costs (*s*).

It is a general rule when the difficulty in the execution of a trust is created by the ambiguous expressions contained in the will, to throw the costs of a suit which may become necessary upon the general assets of the testator (*t*).

Where charitable bequests have been declared void on an information or bill to establish them, and decreed to fall into the residue of the testator's estate, the costs of the suit have frequently been directed to be paid out of the testator's general assets (*u*).

Thus a bill for obtaining payment of a charitable legacy was dismissed without costs, because the court considered it a fit case to be submitted to the court (*v*).

The court, in the exercise of its discretion, will, as justice requires, either apportion the costs between different parties, or throw them upon particular estates and funds, as where long inquiries were required as to some, but not as to other shares (*w*).

Where an heir-at-law filed a bill for the purpose of having charitable bequests declared void within the stat. 9 Geo. II. c. 36, a bill having been previously filed for establishing them, the bill by the heir-at-law being considered unnecessary, as he might have come in under the other bill, the costs of the personal estate were ordered out of it, and the other costs out of the real estate, in order to throw the costs unnecessarily incurred by the heir, upon the real estate (*x*).

Where a company was declared a trustee of the surplus income of one estate, and beneficially entitled to the surplus

(*s*) *Attorney General* v. *Lord Dudley*, Coop. C. C. 146.

(*t*) *Pearson* v. *Pearson*, 1 Sch. & Lef. 12; *Jolliffe* v. *East*, 3 Br. C. C. 26.

(*u*) *Attorney General* v. *Hinxman*, 2 Jac. & Walk. 278; *Kirkbank* v. *Hudson*, 7 Price, 222.

(*v*) *Giblett* v. *Hobson*, 5 Sim. 662. *Ante*, p. 194.

(*w*) *Basevi* v. *Serra*, 14 Ves. 313; *S. C.* 3 Mer. 674; *Leacroft* v. *Maynard*, 1 Ves. jun. 279; *S. C.* 3 Br. C. C. 233.

(*x*) *Leacroft* v. *Maynard*, 1 Ves. jun. 280.

rents of another estate, the costs of a suit respecting the two estates were directed to be apportioned and paid according to the relative annual value of the two estates; but the costs and expenses of the scheme for the establishment of the school, and of the proceedings relative to that part of the case were directed to be defrayed wholly out of the estates, to the whole of which the charity was declared to be entitled (*y*).

In *Paice* v. *Archbishop of Canterbury* (*z*), where real and personal estates were given for payment of debts and legacies, and the remainder to charitable uses, the latter gift being void so far as it affected the real estate, the costs of the suit for carrying into effect the charities were directed to be paid out of such part of the residue as was applicable to charitable purposes.

Where the bequest of the residue of an estate, consisting partly of the produce of real estate, and partly of pure personal estate, was declared void as to the former, the costs of the suit, as between solicitor and client, were directed to be apportioned between so much of the personal estate as arose from leaseholds and money due on mortgages, and so much as arose from other particulars, according to their respective values (*a*).

Where a suit was instituted for a sum of 800*l.*, to be raised out of money to be produced by the sale of real estates, to be invested in the purchase of lands for the benefit of certain charitable institutions, which was decreed to the heir-at-law, and it was contended that the costs should be wholly paid out of the 800*l.*; as the question did not arise upon the 800*l.*, but upon the construction of the residuary clause in the will, the 800*l.* being clearly a lapsed legacy, the costs of the suit were directed to be borne proportionally by the 800*l.* and the surplus produce of the real estates, after paying the 800*l.*; and it was ordered, that the costs of all parties should be

(*y*) *Attorney General* v. *Skinners' Company*, 2 Russ. 407, 446.

(*z*) 14 Ves. 372; 1 Russ. & M. 759, n.

(*a*) *Crosbie* v. *Mayor of Liverpool*, 1 Russ. & M. 761, 2, n.; *Ante*, p. 237.

paid in the first place out of the produce of the real estates, and then that a fair proportion of them should be deducted out of the 800*l.* (*b*).

When a decree of the lord chancellor of *Ireland* is reversed by the House of Lords, the costs of the suit are ordered to be repaid on application, as a matter of course; but it is not the practice of that house to give the costs of an appeal from the Court of Chancery in *Ireland* (*c*).

By the General Inclosure Act, 41 Geo. III. c. 109, s. 31, commissioners for inclosure were empowered to deduct from allotments in respect of charity or school-lands, what should be deemed equal to the proportionable share of the expenses, and to allot the same to the persons undertaking to pay such expenses.

SECTION VI.

Of Proceedings by Petition.

1. *Of Petitions under 52 Geo. III. c.* 101.
2. *Of Petitions in the name of the Attorney General,* p. 497.
3. *Of the appointment of Trustees by Petition,* p. 498.
4. *Of Petitions under particular Acts of Parliament,* p. 508.

1. *Of petitions under 52 Geo. III. c.* 101.] By stat. 52 Geo. III. c. 101, after reciting that it was expedient to provide a more summary remedy in cases of breaches of trust created for charitable purposes, as well as for the just and upright administration of the same; it is enacted, "that in every case of a breach of any trust or supposed breach of any trust created for charitable purposes, or whenever the direction or order of a court of equity shall be deemed necessary for the administration of any trust for charitable purposes, it shall be lawful for any two or more persons to pre-

(*b*) *Jones* v. *Mitchell,* 1 Sim. & Stu. 295; *ante,* p. 222.

(*c*) *Attorney General* v. *Mayor, &c. of Dublin,* 1 Bligh, N. S. 350.

sent a petition to the lord chancellor, lord keeper, or lords commissioners for the custody of the great seal, or master of the rolls for the time being, or to the Court of Exchequer, stating such complaint and praying such relief as the nature of the case may require; and it shall be lawful for the lord chancellor, lord keeper, and commissioners for the custody of the great seal, and for the master of the rolls and the Court of Exchequer, and they are hereby required to hear such petition in a summary way, and upon affidavits or such other evidence as shall be produced upon such hearing to determine the same, and to make such order therein, and with respect to the costs of such applications as to him or them shall seem just; and such order shall be final and conclusive unless the party or parties who shall think himself or themselves aggrieved thereby, shall, within two years from the time when such order shall have been passed and entered by the proper officer, have preferred an appeal from such decision to the house of lords, to whom it is hereby enacted and declared that an appeal shall lie from such order" (*d*).

(*d*) Lord *Redesdale* said, in all cases in which it would be important to substitute summary proceedings instead of the regular mode of proceeding in courts of justice, this act ought to be construed as merely intended for the purpose of saving time or expense; and that the intention of the act was to substitute a summary for a more regular proceeding, although he doubted whether the end would be attained. He expressed a fixed and rooted objection to any rash alterations of established laws, because he was thoroughly persuaded that generally speaking, such alterations lead to mischief. In the first place, they are generally ill understood, precipitately undertaken, and loosely expressed; and that which the wisdom of ages has contrived to have clearly described, is confused by the words of an act of Parliament often extremely difficult to interpret. The fair way of interpretation of every act of this description was in his opinion to proceed by analogy to that which existed before, and to conceive that Parliament did not intend that any other alteration shall be made, than that which it expressly said shall be made.

It says that the proceedings instead of being in the form of an information, shall be by petition and upon affidavits, or such other evidence as shall be produced to determine the matter, and such order shall be made for costs and other matters, as the court shall think proper. *Corporation of Ludlow* v. *Greenhouse*, 1 Bligh, N. S. 48, 49.

The second section enacts, "that every petition so to be preferred as aforesaid, shall be signed by the persons preferring the same, in the presence of and shall be attested by the solicitor or attorney concerned for such petitioners, and every such petition shall be submitted to and be allowed by his majesty's attorney or solicitor general, and such allowance shall be certified by him before any such petition shall be presented."

Lord *Redesdale* thought that the preamble of the act imported that it was applicable to those cases only in which upon complaint made by petition the Court of Chancery could see the whole of the proceedings which they were called upon to institute, and all that ought to be done by them in consequence. The act does not create what may properly be called a new jurisdiction, but it gives the liberty to proceed upon the old jurisdiction in a summary way in certain cases; it certainly does not provide for a variety of cases relating to charitable uses and trusts, it cannot possibly therefore extend to all; it must be considered as extending to certain particular cases (*e*).

His lordship thought that the act must have been intended by the legislature to apply only to the simple cases mentioned in the preamble where there is a breach of trust, and where there was no question with respect to the persons interested in that trust, or in what manner such breach of trust was to be acted upon, in a case where the assistance of the court was necessary for the purpose of directing in what manner the charity funds, which did not appear to have been clearly defined by the founder of the charity, should be disposed of. Wherever the disposition in favour of a charity clearly points out in what manner the funds are to be disposed of, there is no authority or right to interfere, and the court never does interfere ordinarily, if it appears clearly how the funds of the charity are to be disposed of. When the case goes further, and there is a clear breach of trust, and where persons are interested against whom no breach of trust can be alleged; and, therefore, who cannot be brought before the court upon a pro-

(*e*) 1 Bligh, N. S. 63, 64.

ceeding of this description, because they are not within the words of the act, to such a case it cannot apply. It also cannot apply to any case where the matter of inquiry does not relate to a breach of trust, but where matters are to be inquired of which are of a totally different description (*f*). The act applies to that sort of single cases where nothing was to be inquired, but whether A. B. & C., made parties to a petition, had been guilty of a breach of trust, and to order that to be done in consequence which seemed fit and necessary (*g*). Unless the act be confined within a narrow compass, instead of being productive of convenience, it will be productive of inconvenience, and instead of saving expense in the administration of charities, it will be the means of creating very great expense without at all facilitating the object in view (*h*).

Lord *Eldon* said, "the intention of the legislature in framing the above act was to guard charitable trusts from abuse, and, for that purpose, to prevent proceedings from being instituted for the mere purpose of costs, which are payable out of the funds of the charity. With that view the legislature provided for the signature of the attorney general, or, in case of there being none, of the solicitor general; and no petition under the act ought to receive such signature, except upon the same deliberation that it would be fit to afford to the case if it were presented in the shape of an information. A petition under the act can derive no sanction from the signature of the solicitor general, unless there be no attorney general, the former being competent to act as, and in the place of the latter, only when the office of attorney general is vacant (*i*). The solicitor general is not an officer of the crown for proceeding in cases of charities, while there is an attorney general, the office of solicitor general being subordinate" (*k*).

It was held that the attorney general has the same control over a proceeding by petition, under this act, as he has over

(*f*) 1 Bligh, N. S. 66, 67.
(*g*) Ibid. 81.
(*h*) Ibid. 86.
(*i*) *Ex parte Skinner, in re Lawford Charity*, 2 Mer. 453.
(*k*) *Corporation of Ludlow* v. *Greenhouse*, 1 Bligh, N. S. 65; *Ante*, p. 399.

informations filed in his name. Lord *Eldon* said, " that the act was to be construed by applying the principles belonging to informations, at least by allowing the attorney general to interpose against a petition, which has been sanctioned by him, to the same extent as he can interpose with respect to proceedings by information; therefore the allowance by the attorney general of a petition, required by the second section of the act, will have no other effect than his being a party to an information has; and although the attorney general has approved a petition, he is not precluded from correcting his opinion if those interests, which he is bound to protect, require it—being obliged to take care that the proceeding is reasonable, fair, and judicial between the parties; therefore there was no objection to hearing the attorney general in support of an appeal against an order made on a petition which he had allowed" (*l*).

It is not necessary that the attorney general should be a party to a petition under this act, it is sufficient for him to certify his allowance of the petition (*m*). An order made on a petition, preferred by trustees under this act, without the authority of the attorney general is a nullity (*n*).

Although the act authorises " any two or more persons" to present a petition, it was held by Lord *Eldon* " that no person could petition who had not a direct interest in the charity" (*o*).

A petition for the regulation of abuses in a charity, if preferred by *one* person only, or presented to the lord chancellor, as representing the king, cannot be sustained under the 52nd Geo. III. c. 101, although certified by the attorney general or solicitor general (*p*).

The relief which may be afforded to charities under the act by petition instead of information, is limited to questions of abuse of trust, as between the trustees and the objects of the charity; and is not applicable to an adverse claim to land as

(*l*) *Corporation of Ludlow* v. *Greenhouse*, 1 Bligh, N. S. 44—47.

(*m*) *In re Chertsey Market*, 6 Price, 271.

(*n*) *Attorney General* v. *Green*, 1 Jac. & Walk. 303.

(*o*) *In re Bedford Charity*, 2 Swanst. 518.

(*p*) *In re Garstang Church Town School*, 7 Law Journ. Chanc. 169.

having formerly belonged to the charity. Thus where it appeared by a petition that, on the survey of charity estates, it had been discovered that many years ago part of a farm belonging to the charity had been, by the tenant thereof, exchanged with a tenant or agent of another landowner, which appeared not to be the act of the trustees of the charity, who had no power to exchange; and an inquiry was prayed by the petitioner, who was in the possession of the lands of the charity, and that the possession thereof might be re-delivered to the trustees, who offered to restore the lands received as a substitute. The petition was dismissed, as not being the proper mode for deciding the question whether land, alleged to belong to the charity, ever was so; and if it ever was charity land, whether it had been by purchase transferred so that the trust could not attach upon it (*q*).

Where property belonging to a charity has, for a considerable period, been in the possession of parish officers, an inquiry may be directed, on petition, for ascertaining the lands, and for restoring such part as can be identified (*r*).

After a reference had been made to the master, upon petition, under this act, it was held that the subsequent orders might be obtained upon motion (*s*).

A petition under this act, calling on the personal representative of a trustee to admit assets of his estate and effects, for the purposes of the petition, or otherwise that proper accounts might be taken, was held to be clearly not within the act (*t*).

Where a petition was presented under this act, calling upon executors to account for the rents of a charity estate, received by their testator as the manager, and to pay the amount out of the testator's assets, and that if they would not admit assets, that the usual account might be taken of his personal estate, the petition was dismissed with costs, because the residuary legatees had not been

(*q*) *Ex parte Rees*, 3 Ves. & B. 10. Mer. 707. See 10 Ves. 287.

(*r*) *Ex parte Fowlser*, 1 Jac. & Walk. 72.

(*s*) *In re Slewringe's Charity*, 3

(*t*) *Ex parte Skinner in re Lawford Charity*, 1 Wils. C. C. 14.

served with the petition, and because the court had no jurisdiction under the act to direct an account of the testator's personal estate, as against his personal representatives (*v*).

Where a trustee had entered into an agreement to grant a lease of a charity estate for fourteen years, and a petition was presented praying (amongst other things) that the agreement might be declared to be a fraud on the charity, and be set aside and cancelled, and that directions might be given for reletting the estate at the most improved rent, Lord *Eldon* is reported to have stated it to be doubtful, whether a petition seeking a variation of a lease would be within the act (*u*).

On a petition charging the trustees (who had not been served and did not appear) of a charity estate with breaches of trust, and praying their removal, and that the master might approve of a scheme for the future regulation of the charity, the lord chancellor, although entertaining some doubt as to his authority under the act, the trustees not appearing, ordered the trustees, on the next day of petitions, to show cause why the court should not make an order according to the prayer of the petition, or such other order as to the court should seem meet (*w*).

It is inconsistent with the jurisdiction by petition, and the intention of the legislature, that one party should be going on with a petition, and another with an information, where the expenses are to come out of the charity estate (*x*).

Where a petition and an information have been both pending at the same time, the proceedings on them have been ordered to be laid before the attorney general, to consider and certify which should be prosecuted (*y*).

An information having been filed, and a petition presented with the same objects, the court will not separate them, and give relief upon the petition, as to such objects as are

(*v*) *In re St. Wenn's Charity*, 2 Sim. & Stu. 66.

(*u*) *Ex parte Skinner in Lawford Charity*, 1 Wils. C. C. 14; *S. C.* 2 Mer. 453.

(*w*) *Ex parte Seagears in re Mania Charity*, 1 Ves. & B. 496.

(*x*) *Attorney General* v. *Green*, 1 Jac. & Walk, 303.

(*y*) Ibid.

regularly within its limits, and leave the rest to be disposed of on the information, or, in short, grant the relief sought, partly upon information, and partly upon petition (*z*).

Where the crown had granted land for the purpose of a market, which was established by letters patent, it was held that the Court of Exchequer had jurisdiction under the statute 52 Geo. III. c. 101, on a petition presented by inhabitant householders, calling on trustees to account for the misapplication of funds, where the application did not extend to regulate or alter the charity, or to carry it into execution, although the charity was founded by royal charter (*a*).

An order made under this statute by the lord chancellor, for a reference to the master, was discharged on appeal to him, where the trust being constructive was held not to be within the act (*b*).

A testator, having purchased an ancient chapel with a parcel of ground adjoining, devised it by a will, dated in 1590, together with certain messuages, &c. in trust, to complete the building of certain almshouses, which he had commenced on the ground near the chapel, and to apply the rents of the messuages, &c. towards the support of four poor people, with directions for keeping up the chapel and appointing a minister, chiefly for the benefit of the almshouses, but partly also for any other persons who might think fit to attend the service. In 1769, the chapel having fallen into decay, was conveyed, together with the piece of ground, the almshouses, and the messuages, &c., by the heir of the surviving trustee, to the corporation of *Ludlow*, who, in 1771, pulled down the chapel, converted the materials to other purposes, and granted leases of the piece of ground near the chapel, upon which houses were built. On a petition being presented, praying that it might be referred to one of the masters of the court to inquire into the trusts of the charity, and to approve a proper scheme for the due regulation and management

(*z*) *Ex parte Skinner in re Lawford Charity*, 2 Mer. 453.

(*a*) *In re Chertsey Market*, 6 Price, 261, 277.

(*b*) *Ex parte Brown in re Sir J. Norris's Charity*, Coop. C. C. 295.

thereof; and that the lease of the chapel might be ordered to be cancelled, and the yard applied to the purpose of burial, and that an account might be taken of the want of repairs to the chapel, when the same was taken down, and what sum of money would have been sufficient to repair the same, and what sum of money it would then cost to rebuild the chapel upon the same plan and dimensions as the old chapel, and that the corporation might be ordered to account for all the rents and profits of the trust estates, received by them or by their order, or for their use; and also for the timber, pews, stones, and other materials of the chapel, converted or disposed of by them; and that the amount of what should be found due from the corporation, upon taking the accounts, might be paid into the hands of the accountant-general of the court, in trust for the charity; and that if, on taking the accounts, the amount should be found insufficient to rebuild the chapel, that the corporation might be ordered to pay such further sum of money, sufficient to rebuild the chapel, or put the same into the condition it was in at the time when it was taken down; and that proper persons might be appointed feoffees or trustees of the chapel and charity premises; and that the corporation might be ordered to convey the premises to such new feoffees or trustees, upon the trusts of the charity; and that proper directions might be given for registering the charity, according to the provisions of the act of parliament; and that the corporation might be ordered to produce and leave with one of the masters of the court, for safe custody, all the title-deeds, papers, and writings in their custody or power, and upon the oath of their treasurer, secretary, town-clerk, or agent relating to the charity premises. Sir *T. Plumer*, V. C., held that the corporation had committed the grossest and most indecorous breach of trust, by violating the burial-ground and pulling down the chapel, without any authority or sanction—the bell having been carried to the market-place, and the pews to the parish-church; and the stones of the church used in repairs of a bridge, without any pretence that it was necessary for the public safety. His honour said, "that though he could not then direct the corporation to put

the chapel and burial-ground in the state it was, he would do what he could; and ordered them to account for the materials of the chapel, and the pews, the bells, and to pay the value; and directed an inquiry as to the expense of restoring the chapel and burial-ground (*c*).

Upon appeal to the House of Lords, it was held that the case was not a proper subject of a petition. There were other objections to the relief prayed, because neither the lessee of the land nor the heir of the founder (in whom the right of nominating new trustees was vested) were parties; and justice could not be done between the several parties interested without various other proceedings, which could not have been included in the petition, the act applying only to simple cases, and not to those which are involved with various difficult questions (*d*).

Where the only question is in what manner a trust shall be executed, and how trustees are to be appointed, the lord chancellor may give directions, upon petition; but where there is a question as to the nature of the trust and who are the parties to manage it, it is not a case for a petition, but the party ought to proceed by information (*e*).

Upon a petition under the stat. 52 Geo. III. c. 101, the court will adjudicate between the conflicting claims of different objects of a charity, where the point to be decided is simply a question on the construction of a particular instrument.

Thus where by deed dated in 1656, the *Grocers' Company* in London agreed to apply an annual gift of 10*l.* a year for apprenticing a boy with certain qualifications from the parish of *Upton Warren;* and if none could be found there from two other parishes alternately, to be elected by the minister, churchwardens, and inhabitants of *Upton Warren,* and presented to the said company within 120 days after the 1st May in every year, and in case of neglect in or failure of presenting such an apprentice, the 10*l.* a year was directed to be paid to the treasurer of Christ's Hospital, *London,* towards

(*c*) *Ex parte Greenhouse,* 1 Madd. R. 92; *S. C.* 1 Wils. C. C. 18.

(*d*) *Corporation of Ludlow* v. *Greenhouse,* 1 Bligh, N. S. 17.

(*e*) *Corporation of Ludlow* v. *Greenhouse,* 1 Bligh, N. S. 86.

the maintenance of the poor children in that house. It appeared that, for many years, the Grocers' Company applied the annual sum of 10*l.* in apprenticing out a poor boy sent from the parish of *Upton Warren*, according to the trusts of the deed. Latterly, no applications were made for the premium, and from the year 1794 downwards it had not been claimed; and an arrear of thirty-eight years having accumulated, a petition was presented, under the stat. 52 Geo. III. c. 101, praying that the Grocers' Company might pay up the arrears, and that the charity might be regulated, and a scheme settled for carrying into effect the intentions of the founder, in a manner better suited to the habits of the times.

Christ's Hospital having set up a claim to the arrears founded on the limitation over to the treasurer, in default of the nomination of an apprentice, out of the specified parishes, the vice chancellor decided against such claim, on the ground that *Upton Warren*, was the primary object of the donor's bounty; and that the two substituted parishes had no notice of the lapse, or of the rights which accrued to them on that event; and he referred it to the master to consider of a scheme.

Lord *Brougham*, on appeal, said, "In this case I entertain little or no doubt, except upon the question of jurisdiction now raised at the eleventh hour, a period at which such an objection ought to be very clear, in order to prevail. With respect to that point, however, I am very far from conceding it to be, as has been argued, clearly in the appellant's favour. On the contrary, after looking into the cases referred to, particularly the one in the House of Lords, and the words of the preamble of the act of parliament, I am by no means satisfied that the language ascribed to Lord *Redesdale*, in delivering judgment in the *Corporation of Ludlow* v. *Greenhouse* (*f*), is sufficient to support the objection to the present mode of proceeding; more especially when I consider the subject matter of this petition, and the nature of the question which has been raised upon it. The appeal must therefore be dismissed with costs" (*g*).

Where there is a deed expressly declaring the intention

(*f*) 1 Bligh, N. S. 17.

(*g*) *In re Upton Warren*, 1 Mylne & Keen, 410.

of the subscribers to a charity school, the court can only proceed on that deed, and has no jurisdiction upon petition to correct the violation of the trusts of the deed, nor to interfere with an institution supported only by voluntary contributions (*h*).

(*h*) In the year 1814, a deed was executed, whereby a plot of ground, on which a schoolhouse had been built, partly by voluntary subscriptions, and partly by money borrowed, was assigned to trustees for the remainder of two long terms of years, upon trust to borrow such money as would defray all expenses of the deed, the rents and repair of the premises, and the expense of the building; and upon further trust to permit the building to be used as a school for the education and religious instruction of the children of the labouring poor, residing within the township of *Macclesfield*, and the adjoining and neighbouring townships, by persons of good character, who should not be allowed to teach anything contrary to the great and leading doctrines of religion, as defined in the articles, homilies and liturgy of the church of England, under such rules, orders and regulations for the management and conduct of the said school as then were, or should thereafter be made by a committee to be annually chosen, according to the then existing regulations, which should be set forth in the minute books of the committee and teachers' meetings, but for and during so long time only as such committee should be enabled to carry on the said institution, by means of gratuitous teachers, and when such an application of the said building should become impracticable, either from an insufficient number of scholars, or a want of funds to carry on the institution, or otherwise, then the trustees should thenceforth permit and suffer the said building to be used as an hospital, or for some other purpose beneficial to the poor inhabitants of *Macclesfield*, and the neighbouring townships, provided that the trustees should not be at liberty to convert the premises to any other use or purpose, so long as 150 scholars should attend the school, and gratuitous teachers be procured to instruct them; but it was thereby declared, that the majority of the committee for the time being, might permit the upper room, or any other part of the building, to be used as a lecture room, or rooms for meeting for any religious, charitable, or other laudable purpose, so as not to interfere with the regular and proper use of the said building for the purposes therein before appointed.

After the execution of the deed, the acting trustees, and a majority of the committee, appointed a minister, not of the established church, to be a chaplain to the institution, at a salary of 170*l. per annum*, whose duty it was to preach three public sermons weekly at the school, and to deliver a monthly lecture, which sermons and lectures were attended by adults, as in the ordinary case of a place of public worship —*Ex parte Pearson in re Macclesfield School*, 6 Price, 214.

On a petition presented by some of the trustees of a charity school, praying that the trustees acting in the management of the charity, might be ordered to produce the trust deed for the inspection of the petitioners—that the trusts might be ordered to be performed under the directions of the court—that the appointment of a chaplain with a salary, and the using the upper part of the building (which had been erected for the purpose of the school) as a chapel, might be declared to be contrary to the trust, and directed to be discontinued—and for an account of the application of money received by the treasurer on the part of the charity.

Richards, C. B. observed, "this court being called on to interfere with respect to this particular charity, must not fail to recollect that it has no existence except from the daily and voluntary contribution of the subscribers, who may withhold their subscriptions to-morrow, when there would be an end of the institution altogether. If we had any jurisdiction in a case of this description, it would be a most injurious thing to make an order now, in its nature decretal, in a case wherein before that order should reach *Macclesfield*, the institution might in consequence be put an end to. But without entering into the consideration of that part of the subject, although it is extremely important, it is material to consider the nature, foundation, and object of this charity, supposing it permanent.

"It appears quite clear that the appointment of the person who preaches, does not encroach on that part of the charity, the care of which is the only subject matter of this petition to which we can attend; and any person who contributed to the benefit of the charity, had a right to say, that he gave one half to the children, and the other half to the benefit of the person who preaches to the institution. Under these circumstances, it seemed first, that it was a voluntary charity with which the court did not know how to deal; secondly, that upon the construction of the deed itself, by which their conduct is to be wholly directed, there was nothing in evi-

dence to show that the acts of the respondents had been, in any degree, contrary to the directions of that deed, the petition was therefore dismissed.

"It was clear that the school must be conducted according to the deed so as best to effect its object, the education and religious instruction of the children of the labouring poor. But the deed was not contravened at all, unless doctrines had been taught there contrary to the leading principles of the established church. Where an institution is founded with permanent funds for the education of the poor, the trustees cannot apply such funds to other purposes; but where funds are supplied by subscribers, who know the purposes to which they are to be devoted, those persons may, certainly, apply them to any purpose, and the committee may allow them the use of this room, even according to the deed, for the accommodation of those who might be desirous of using it as a place of meeting for religious worship, provided there be not promulgated there, doctrines adverse to those of the established church, and such accommodation do not interrupt the business of the school." (*i*)

Where a petition is presented for carrying a charity into execution, and for calling for the rents and profits of the charity estate, all who were concerned in the trust must be before the court, which will not entertain charges against one of several trustees, or his representatives, on the ground of his being the acting trustee, nor compel his representatives to account for his proportion when the other trustees or their representatives are not before the court (*k*).

Petitioners complaining of the acts of a trustee at such a distance of time as renders it impossible for him to make such a defence as he might otherwise have done, will not be entitled to relief. Where the act complained of took place in 1809, and the trustee died in 1812, the not presenting a petition until six years afterwards, was held such delay as

(*i*) *Ex parte Pearson in re Macclesfield School*, 6 Price, 214. See *ante*, pp. 419, 420.

(*k*) *In re Chertsey Market*, 6 Price, 278, 9.

would bar the right of proceeding against the representatives of the trustee, although in this case there was no breach of trust (*l*).

After an order of reference to the master in pursuance of a petition under the stat. 52 Geo. III. c. 101, the subsequent applications, as to confirm the master's report, may be made by motion without petition (*m*).

On a petition to confirm the master's report under a reference, a counter petition may be presented excepting to the report (*n*).

A petition having been presented for regulating a charity under the 52 Geo. III. c. 101, and an order made, upon petition, for the payment of a sum of money to the schoolmaster, it was held, that an application for enforcing the order might be made upon a motion without a petition (*o*).

In a charity petition, to which the trustees of a charity were respondents, and had been ordered to pay the costs of the petition, upon an application relative to the service of the order, it was held that the trustees, being respondents, were parties to the petition, and therefore that the case was not within the 44th of the new orders of 1828 (*p*).

The master is not bound to adopt a mode of proceeding different from the court, which will decide petitions under the act upon affidavits; and therefore upon an order made on a petition, directing certain inquiries to be made by the master, *affidavits* may be received by him in evidence, and

(*l*) *In re Chertsey Market*, 6 Price, 285.

(*m*) *In re Slewringe's Charity*, 3 Mer. 707. See *ex parte, a Friendly Society*, 10 Ves. 287.

(*n*) *Ex parte Fowlser*, 1 Jac. & Walk. 71.

(*o*) *In re Chipping Sodbury School*, 5 Sim. 410.

(*p*) *In re Willoughby's Charity*, 6 Sim. 18. The 44th order is, "that whenever a person who is not a party appears in any proceeding, either before the court or before the master, service upon the solicitor in *London*, by whom such party appears, whether such solicitor act as principal or agent, shall be deemed good service, except in matters of contempt requiring personal service."

his report made upon them without the evidence of witnesses examined before him, or before commissioners upon interrogatories (*q*).

A person who was not a party to a petition in the court below, cannot appeal to the House of Lords; and will be compelled to pay the costs of an attempt to interfere in that way (*r*).

In a charity information it is irregular for persons, being inhabitants of a parish interested in the charity, but not being parties to the information, to present a petition in the cause; nor is the irregularity cured by the circumstance of a defendant in the information joining with them as a petitioner (*s*).

By stat. 59 Geo. III. c. 91, s. 5, it is enacted, "that whenever it shall appear to the trustees of any free-school, hospital, or other charitable institution or donation within the provisions of that act, that the statutes or regulations thereof are insufficient for the secure and due administration of the funds thereto belonging, it shall be lawful for such numbers of them as are by the said statutes or regulations empowered to do any act, by and with the consent of any five or more of the said commissioners (appointed to inquire concerning charities), to present a petition to the lord chancellor, lord keeper, or lords commissioners of the great seal, or to the Court of Exchequer sitting as a court of equity, praying such relief as the nature of the case may require; and the lord chancellor, lord keeper, and lords commissioners of the great seal, and the said Court of Exchequer, are thereby authorised and empowered to give such directions, and to make such order, touching the matter of the said application, as to them respectively shall seem fit; which order shall be final and conclusive to all intents and purposes whatsoever, unless the party or parties who shall think himself or themselves aggrieved thereby shall, within two years after the time when such order shall have been

(*q*) *Ex parte Greenhouse*, 1 Swanst. 60; *S. C.* 1 Wils. C. C. 18.

(*r*) 1 Bligh, N. S. 73, 89.

(*s*) *Attorney General* v. *Leckmere*, 3 Law Journ. Chanc. 125.

made and entered by the proper officer, prefer an appeal from such order to the House of Lords, to whom it is hereby enacted and declared that an appeal shall lie from such order."

2. *Of petitions in the name of the attorney general.*] The statute 59 Geo. III. c. 91, authorising the attorney general to make a summary application, by petition, to a court of equity, in cases which have been certified by the charity commissioners, has been already noticed (*t*). Numerous petitions have been presented in the attorney general's name at the instance of the charity commissioners. The following are some of the objects sought to be attained. For the appointment of trustees of the charity estates, and for vesting the estates in them, and for a scheme for the regulation of the charity (*v*).

For an account of rents and profits, the removal of trustees, and the appointment of others, and for settling a scheme for the regulation of the charity (*u*).

For ascertaining the rights and interests of the schoolmaster and almsmen in the revenues, and for a reference to the master to take an account of the charity property, and to approve a scheme for the due application of the revenues (*w*).

For ascertaining what townships were entitled to the benefit of a charitable bequest, and for directions for the due application thereof (*x*).

For establishing a charity for relieving the master of a free-school from conditions which had become impracticable, and for declaring in what manner the income ought, under the circumstances, to be applied (*y*).

For proof of a balance due from a trustee of a charity, under a commission of bankrupt against him for payment of

(*t*) *Ante*, pp. 428, 430.

(*v*) *In re Bampfield's Charity*, 5th Nov. 1825; 22nd Jan. 1827.

(*u*) *In re Bateman's Charity*, 5th Nov. 1823.

(*w*) *In re Tadcaster School and Hospital*, 21st Jan. 1826; 10 Charity Rep. 722.

(*x*) *In re Ward's Charity*, 26th July, 1823; 2nd June, 1825; 7 Charity Rep. 512.

(*y*) *In re Hutton's Charity*, 7th Aug. 1827; 21st Dec. 1827.

dividends, to be received into court for their investment; and for appointment of new trustees, and the transfer of the stock to them (*z*).

For directions for the administration of a charity with respect to the increased income (*a*).

For taking the accounts of trustees, and settling a scheme for the future application of the charity funds (*b*).

For confirming a compromise, on payment of a sum in discharge of any claim of the charity on a particular estate (*c*).

3. *Of petitions for the appointment of trustees.*] By statute 11 Geo. IV. and 1 Will. IV. c. 60, s. 3, where the trustee of any land shall be lunatic, the committee of the estate of such person may, by the direction of the lord chancellor of *Great Britain* (*d*), intrusted with the care of the persons and estates of persons found idiot, lunatic, or of unsound mind, convey such land, in the place of such trustee, to such person and in such manner as the said lord chancellor shall think proper.

By the fourth section, where any stock shall be standing in the name of any person who shall be a lunatic, as a trustee or executor, alone or jointly with any other person, or shall continue to be standing in the name of a deceased person whose executor shall be lunatic, or shall be otherwise vested in or transferable by any person who shall be lunatic, for the benefit of some other person, the lord chancellor, intrusted as aforesaid, may direct the committee of the estate of any such lunatic to transfer, or join in transferring, such stock to or into the name of such person and in such manner as the said lord chancellor shall think proper; and also order such person, appointed as aforesaid, to receive and pay over, or join

(*z*) *In re Modbury School, Devon*, 31st May, 1823.

(*a*) *In re Wilkson's Charity*, 24th April, 1828; 1st Aug. 1829.

(*b*) *In re Carter's Charity*, 13th Feb. 1830.

(*c*) *In re Lady Calverley's Charity*, 10th Nov. 1830.

(*d*) By the 27 & 28 sections, the powers of this act are given to the Lord Chancellor of *Ireland*, as to land and stock there; and extended to the lord keeper and lords commissioners of the great seal of *Great Britain* and of *Ireland* respectively.

in receiving and paying over, the dividends of such stock in such manner as the said lord chancellor shall direct.

By the fifth section, where any such trustee as aforesaid, being lunatic, shall not have been found such by inquisition, the lord chancellor, intrusted as aforesaid, may direct any person whom the said lord chancellor may think proper to appoint for that purpose in the place of such last-mentioned lunatic, to convey or join in conveying such land, or to transfer or join in transferring such stock, and receive and pay over the dividends thereof, as thereinbefore is mentioned.

By the sixth section, where any trustee of any land shall be under the age of twenty-one years, such infant, by the direction of the Court of Chancery, may convey the same to such person and in such manner as the said court shall think proper (*e*).

By the seventh section, where the trustee of any land situated within the duchy of *Lancaster*, or the counties palatine of *Chester*, *Lancaster*, and *Durham* respectively, or the principality of *Wales* (*f*), shall be under the age of twenty-one years, such infant, by the direction of the Court of the Duchy Chamber of *Lancaster*, the Court of Exchequer in the county palatine of *Chester*, the Court of Chancery in the county palatine of *Lancaster*, the Court of Chancery in the county palatine of *Durham*, and the several courts of great session in *Wales* respectively, as to premises within the jurisdiction of the same courts respectively, may convey such lands to such person and in such manner as the said courts respectively shall think proper, in like manner as such infant is thereinbefore empowered to convey the same by the direction of the Court of Chancery.

By the eighth section, where any trustee of any land shall be out of the jurisdiction of or not amenable to the process of

(*e*) By the 30th section of the act, the powers given to the Court of Chancery are extended to the Court of Exchequer; and by the 31st section, the powers given to the Courts of Chancery and Exchequer in *England*, are extended to the same courts in *Ireland*, as to land and stock in *Ireland*.

(*f*) See 11 Geo. IV. and 1 Will. IV. c. 70, s. 31, *post*. p. 505,

the Court of Chancery or Exchequer, or it shall be uncertain, where there were several trustees, which of them was the survivor, or it shall be uncertain whether the trustee last known to have been seised as aforesaid be living or dead, or, if known to be dead, it shall not be known who is his heir; or if any trustee seised as aforesaid, or the heir of any such trustee, shall neglect or refuse to convey such land for the space of twenty-eight days next after a proper deed for making such conveyance shall have been tendered for his execution by, or by an agent duly authorised by, any person entitled to require the same; then and in every or any such case, the said Court of Chancery or Exchequer may direct any person whom such court may think proper to appoint for that purpose, in the place of the trustee or heir, to convey such land to such person and in such manner as the said court shall think proper.

By the ninth section, where any trustee of any land for any term of years shall be out of the jurisdiction of or not amenable to the process of the Court of Chancery, or it shall be uncertain whether the trustee last known to have been possessed as aforesaid be living or dead; or if any such trustee or his executor shall neglect or refuse to assign or surrender such land for the space of twenty-eight days next after a proper deed for making such assignment or surrender shall have been tendered for his execution by, or by an agent duly authorised by, any person entitled to require the same; then and in every or any such case, the said Court of Chancery or Exchequer may direct any person whom such court may think proper to appoint for that purpose, in the place of the trustee or executor, to assign or surrender such land to such person and in such manner as the court shall think proper.

By the tenth section, where any person in whose name, as a trustee or executor, (either alone or together with the name of any other person,) or in the name of whose testator, (whether as a trustee or beneficially,) any stock shall be standing, or any other person who shall otherwise have power to transfer or join with any other person in transferring any stock to which some other person shall be beneficially entitled, shall be out of the jurisdiction of or not amenable to the process of

the Court of Chancery, or it shall be uncertain whether such person be living or dead; or if any such trustee or executor or other person shall neglect or refuse to transfer such stock, or receive and pay over the dividends thereof, to the person entitled thereto or to any part thereof respectively, or as he shall direct, for the space of thirty-one days next after a request in writing for that purpose shall have been made to any such trustee or executor or other person by the person entitled as aforesaid; then and in every or any such case the Court of Chancery may direct such person as the said court shall think proper to appoint for that purpose, in the place of such trustee or executor or other person, to transfer or join in transferring such stock to or into the name of such person and in such manner as such court shall direct, and also to order any person appointed as aforesaid to receive and pay over or join in receiving and paying over the dividends of such stock in such manner as the said court shall direct (*g*).

By the eleventh section, every direction or order to be made in pursuance of that act by the lord chancellor, intrusted as aforesaid, or by the Court of Chancery or Exchequer, or by any other court thereinbefore mentioned, shall be signified by an order to be made in any cause depending in such court respectively, or upon petition in the lunacy or matter; and such person as thereinafter is mentioned shall be the petitioner, whether such person be or be not under any legal disability; if the same shall relate to a conveyance in order to vest any land or stock in a new trustee duly appointed by virtue of some power or authority in some instrument creating or declaring the trusts of such land or stock, or by the Court of Chancery or Exchequer, either alone or together with any continuing trustee, then upon the petition either of the trustee or some or one of the trustees in whom the same shall be proposed to be vested, or of any person having an interest therein (*h*).

(*g*) It was not intended by the ninth and tenth sections of this act to supply the want of a personal representative of a chattel interest, or of stock.—*In re Anderson*, Lloyd & Goold, Ir. Rep. 27.

(*h*) Lord *Lyndhurst* said that "this section gave a discretionary power to the court to make an order."—2 Mylne & K. 626.

By the fifteenth section, every person, being in other respects within the act, shall be deemed to be a trustee within the act, notwithstanding he may have some beneficial estate or interest in the same subject, or may have some duty as trustee to perform; but in every such case, it shall be in the discretion of the said lord chancellor, intrusted as aforesaid, or the said Court of Chancery or Exchequer, if under the circumstances it shall seem requisite, to direct a bill to be filed to establish the right of the party seeking the conveyance or transfer, and not to make the order for such conveyance or transfer unless by the decree to be made in such cause, or until after such decree shall have been made.

By the nineteenth section, where any feme covert would be a trustee, heir, or executor, within the provisions of that act, if she were an infant or lunatic, or out of the jurisdiction or not amenable to the process of the Court of Chancery or Exchequer, or had refused or neglected as aforesaid to execute or make such conveyance, transfer, receipt, or payment as thereinbefore is mentioned, and the concurrence of her husband shall be necessary in any conveyance, transfer, receipt, or payment which ought to be made or executed by her as such trustee, heir, or executor, then and in any such case such husband, whether under any disability or not, shall be and be deemed to be a trustee within the act.

By the twenty-first section, it is enacted that the provisions thereinbefore contained shall extend to all cases of petitions in which the lord chancellor, intrusted as aforesaid, or the Court of Chancery or Exchequer, or any of the judges thereof, is by law authorised and empowered to grant relief and make summary orders without suit, either in matters of charity, or relative to or for the better security, or for the application, receipt, payment, or transfer of any of the funds thereof, or in matters relative to any benefit or friendly societies, or for the better security, or for the application, receipt, payment, or transfer of any of the funds thereof.

By the twenty-second section, after reciting that cases may occur, upon applications by petition under that act for a conveyance or transfer, where the recent creation or declaration of the trust or other circumstances may render it safe and

expedient for the lord chancellor, intrusted as aforesaid, or the Court of Chancery, (as the case may require), to direct, by an order upon such petition, a conveyance or transfer to be made to a new trustee or trustees, without compelling the parties seeking such appointment to file a bill for that purpose, although there is no power in any deed or instrument creating or declaring the trusts of such land or stock to appoint new trustees, it is enacted, that in any such case it shall be lawful for the lord chancellor, intrusted as aforesaid, or the said Court of Chancery, to appoint any person to be a new trustee, by an order to be made on a petition to be presented for a conveyance or transfer under that act, after hearing all such parties as the said court shall think necessary; and thereupon a conveyance or transfer shall be made and executed, according to the provisions thereinbefore contained, to or so as to vest such land or stock in such new trustee, either alone or jointly with any surviving or continuing trustee, as effectually and in the same manner as if such new trustee had been appointed under a power in any instrument creating or declaring the trusts of such land or stock, or in a suit regularly instituted (*i*).

By the twenty-third section, it is enacted, that where all the persons in whom any land may have been vested, in trust for any charity or charitable or public purpose, shall be dead,

(*i*) This clause of the act was intended to apply to a plain case without any ambiguity, or to the case of a recent creation of trust, in order to enable the court to appoint new trustees, although no suit has been instituted, or no power of appointing trustees contained in the original instrument creating the trusts. *Whitley & Fishbourne*, Lloyd & Goold, Ir. Rep. 23.—*In re Nicholls*, Ibid. 17.

The court has no jurisdiction under this clause, except where the party might apply by petition under the former sections of the act —that is, in cases of disability by reason of infancy, lunacy, &c. where there is a right to apply under the former sections of the act, the court may appoint new trustees, although no bill has been filed, and although there is no power of appointing trustees in the instrument creating the trust; but the court has no general authority to appoint new trustees where there is no power in the settlement, unless where a bill is regularly filed.—*In re Fitzgerald*, Lloyd & Goold, Ir. Rep. 20.

it shall be lawful for the Court of Chancery or Exchequer, on the petition of the persons or body administering such charity or superintending such public purpose, or of any person on behalf thereof, to direct any master or other officer of the said court to cause two successive advertisements to be inserted in the *London Gazette* and in one or more of the newspapers circulated in the county, city, or place where such land shall be situated, giving notice that the representative of the last surviving trustee do, within twenty-eight days appear or give notice of his title to such master or other officer, and prove his pedigree or other title as trustee; and if no person shall appear to give such notice within such twenty-eight days, or the person who may appear or give such notice shall not, within thirty-one days after such appearance or notice, prove his title to the satisfaction of such master or other officer, then and in such case it shall be lawful for the said court to appoint any new trustees for such charity or charitable or public purpose; and such land may be conveyed to such new trustees by any person whom the said court respectively may direct for that purpose, by virtue of the provisions in that act, without the necessity of any decree (*k*).

By the twenty-fourth section, where in any suit in the Court of Chancery or Exchequer, it shall appear to the court by affidavit that diligent search and inquiry has been made after any person made a defendant who is only a trustee, to serve him with the process of the court, and that he cannot be found, the said court may hear and determine such cause, and make such absolute decree therein against every person who shall appear to them to be only a trustee, and not otherwise concerned in interest in the matter in question, in such and the same manner as if such trustee had been duly served with the process of the court, and had appeared and filed his answer thereto, and had also appeared by his counsel and clerk at the hearing of such cause; but no such decree shall bind or prejudice any person against whom the same shall be made without service of process, in respect of any interest

(*k*) See stat. 2 Will. IV. c. 57, s. 3, *post*, p. 505.

which such person shall have at the time of making such decree, for his own benefit, or otherwise than as a trustee as aforesaid.

By the twenty-fifth section the lord chancellor, intrusted as aforesaid, and the Court of Chancery or Exchequer, may order the costs and expenses of and relating to the petitions, orders, directions, conveyances, and transfers to be made in pursuance of that act, or any of them, to be paid and raised out of or from the land or stock or the rents or dividends in respect of which the same respectively shall be made, or in such other manner as the said lord chancellor or court shall think proper.

By the thirty-first section of the statute 11 Geo. IV. and 1 Will. IV. c. 70, which abolished the jurisdiction of the Court of Session of the county of *Chester*, and of the Courts of Great Sessions, in law and equity, in *Wales* (*l*), it is enacted, that in all cases where any trust for charitable uses or of a public nature shall have been cast upon the judges of the courts thereby abolished, by virtue of their offices, it shall be lawful for the lord high chancellor or keeper of the seals for the time being, or for the judges of assize upon their circuits in the county of *Chester* or principality of *Wales*, to appoint such other trustee or trustees as they shall think fit, by any writing under their hands, in the place of the former judge or judges; which trustee or trustees, so named, shall have the same power and authority, and be subject to the same rules and duties, as the trustee or trustees for whom he or they may be substituted.

By stat. 2 Will. IV. c. 57, s. 3, it is enacted, that where the person, or all the persons, if more than one, in whom any lands, hereditaments, rent-charge, or other real property may have been vested in trust for any charity or charitable or public purpose, shall be dead, it shall be lawful for the said Court of Chancery or the said Court of Exchequer (sitting as a court of equity) on the petition of his majesty's attorney general, or of the persons or body administering such charity

(*l*) *Ante*, p. 280, n. (*r*).

or superintending such public purpose, or of any person on behalf thereof, to direct any master or other officer of the said courts respectively to cause two successive advertisements to be inserted in the *London Gazette*, and in one or more of the newspapers circulated in the county, city, or place where such land, hereditaments, or real property, or the lands or hereditaments out of which such rent-charge is issuing, shall be situated, giving notice that the representative or representatives of the person of the last survivor of the persons in whom any land, hereditaments, rent-charge, or other real property may have been vested in trust as aforesaid, do within twenty-eight days appear or give notice of his or their title to such master or other officer, and prove his or their pedigree or other title as trustee; and if no person shall appear to give such notice within such twenty-eight days, or the person or persons who may appear or give such notice shall not, within thirty-one days after such appearance or notice, prove his or their title to the satisfaction of such master or other officer, then and in such case it shall be lawful for the said courts respectively to appoint any new trustees for such charity or charitable or public purpose, in case no trustees for such charity or purpose duly appointed shall then be existing; and such land, hereditaments, rent-charge, or other real property may be conveyed to such new trustees when so appointed by the said courts respectively, or to the existing trustees previously duly appointed, as the case may be, by any person whom the said courts respectively may direct for that purpose by virtue of the provisions in that act, without the necessity of any decree (*m*).

(*m*) The following order was made in pursuance of this act: "It is ordered that it be referred to the master, in rotation, to inquire and state to the court who is the heir-at-law of Dr. W. S., deceased, the founder of the charity in the pleadings mentioned, commonly called Dr. S.'s almshouses; and for that purpose the said master is to cause an advertisement to be published in the *London Gazette*, and in such other papers as he shall think fit, for any person or persons claiming to be heir-at-law or heirs-at-law of the said testator, to come in before him and make out their descent; and the said master is to fix a peremptory day for that purpose; and such of them as shall not come in

Where the founder of a charity, consisting of a sum invested in the funds, appointed persons filling annual offices to be trustees, the court, on petition, directed other trustees to be appointed in their place, on account of the difficulty with respect to the investment of the funds, from the circumstance that two of the trustees, being changed annually, the dividends could not be received without frequent transfers; but the nomination and approval of the objects of the charity was left to those appointed by the founder (*n*).

Trustees of a charity are never appointed without a reference to the master, though the amount of the fund be extremely small; but he may be ordered to appoint the trustees at once, without coming back to the court (*o*).

By the 71st section of statute 5 & 6 Will. IV. c. 76, for regulating municipal corporations in *England* and *Wales*, after reciting that divers bodies corporate then stood seised or possessed of sundry hereditaments and personal estate, in trust, in whole or in part, for certain charitable trusts, and that it was expedient that the administration thereof be kept distinct from that of the public stock and borough fund, it is enacted, "that in every borough in which the body corporate, or any one or more of the members of such body corporate, in his or their corporate capacity, now stands or stand solely, or together with any person or persons elected solely by such body corporate, or solely by any particular number, class, or description of members of such body corporate, seised or possessed for any estate or interest whatsoever of any hereditaments, or any sum of money, chattels, securities for money, or any other personal estate whatsoever, in whole or in part, in

by the time to be therein limited, are to be excluded the benefit of this decree; and it is ordered that the said master do approve of a scheme for the future regulation of the said charity, and for the nomination and election of persons to be admitted into the said almshouses as vacancies occur, and for the future appointment of trustees of the said charity from time to time."—*Attorney General* v. *Watson and others*, Reg. lib. A. 1833, fol. 1067.

(*n*) *Ex parte Blackburne, in re Taylor's Charity*, 1 Jac. & Walk. 297.

(*o*) *Attorney General* v. *The Earl of Arran*, 1 Jac. & Walk. 229.

trust or for the benefit of any charitable uses or trusts whatsoever, all the estate, right, interest, and title, and all the powers of such body corporate, or of such member or members of such body corporate, in respect of the said uses and trusts, shall continue in the persons who, at the time of the passing of that act, are such trustees as aforesaid, notwithstanding that they may have ceased to hold any office by virtue of which before the passing of that act they were such trustees, until the 1st day of August, 1836, or until parliament shall otherwise order, and shall immediately thereupon utterly cease and determine: Provided always, that if any vacancy shall be occasioned among the charitable trustees for any borough, before the said 1st day of August, it shall be lawful for the lord high chancellor or lords commissioners of the great seal for the time being, upon petition in a summary way, to appoint another trustee to supply such vacancy; and every person so appointed a trustee as last aforesaid, shall be a trustee until the time at which the persons in the room of whom he was chosen, would regularly have ceased to be a trustee, and he shall then cease to be a trustee: Provided also, that if parliament shall not otherwise direct, on or before the said 1st day of August, 1836, the lord high chancellor or lords commissioners of the great seal shall make such orders as he or they shall see fit, for the administration, subject to such charitable uses or trusts as aforesaid, of such trust estates."

4. *Of petitions under private acts of parliament.*] In some private acts of parliament regulating charities, applications are directed to be made, by petition, in the Court of Chancery. Thus by stat. 59 Geo. III. c. 22, s. 50, the dean and any two of the chapter of the cathedral church of *Hereford*, for the time being, may prefer a petition or petitions concerning *St. Catherine's Hospital*, in *Ledbury*, to any of the judges of that court, who are empowered to hear the same in a summary way, and to make such orders as shall be thought fit.

By 1 & 2 Will. IV. c. 17, s. 29, the governors of *Birmingham Free Grammar School* are directed to obtain the

direction, approbation, or sanction of the Court of Chancery, when necessary, under the provisions of that act, by the order of that court made in a summary way upon a petition, to be presented by the said governors for the time being; but one month's previous notice of the general nature of the intended application must be given in a *Birmingham* newspaper.

By the 14th section of the private act 7 Geo. IV. c. 29 (which repeals the 4th Geo. III. c. 71, and 33 Geo. III. c. 127) for the regulation of the *Bedford* charity, in case the directions therein contained shall be inconvenient or impracticable, or if any doubts, disputes, or difficulties shall arise, or whenever the order of a Court of Equity as to the administration of the said charity estates, or application of the rents thereof, or touching the construction of the rules contained in the schedule to that act, or to be made by the trustees in pursuance thereof, the trustees, or any eight or more of them, may prefer a petition to the lord chancellor, lord keeper, or lords commissioners of the great seal who are directed to cause the same to be heard in a summary way; and such orders as the Court of Chancery shall make therein, or upon the hearing thereof, shall be obeyed by, and be final and conclusive to all persons whomsoever; the costs and expenses to be incurred by every such petition to be paid out of the rents of the charity estates.

By the 15th section of 7 Geo. IV. c. 29, in case any trustee or trustees shall, either whilst a trustee or after he has ceased to be so, misconduct himself in the application of the rents of the charity estates, or in the management thereof, or in not duly accounting, or in the execution of the powers of that act, or shall misdemean himself or themselves in any manner relating to the said charity, or the estates thereof, the attorney general, and also any person or persons whomsoever with his consent, may prefer a petition to the lord chancellor, &c. against any such trustee or trustees, with or without making all or any of the other trustees or any other persons who had been trustees parties, if the attorney general or other persons shall so think fit; and the lord chancellor, &c. is directed to hear such petition, in such manner as shall be thought fit, for

the discovery of the truth; and the orders of the Court of Chancery are to be conclusive, and enforced by the same process as any other orders of the said court; the costs to be paid by such party and out of such fund as the said court shall direct; but the trustees appointed under that act are to be liable to be sued in the same manner as any other trustees for charitable purposes are liable to be sued in law or equity.

By the last-mentioned act, the trustees of the *Bedford* charity, who are a body corporate, are empowered to remove the master of the English school, for just and reasonable cause. One of the masters, who had been dismissed by the trustees, having presented a petition against them, complaining that he had been dismissed irregularly and not for good and reasonable cause, it was held that the court had no jurisdiction to entertain the petition, as the 15th section of the act did not give a power to present a petition calling in question the act of the whole body of trustees, but only to provide for redress to be given in cases where some of the trustees had misconducted themselves, or were alleged to have done so (*p*).

Where petitioners contended that they were entitled to relief, either under the statute 52 Geo. III. c. 101, or the *Bedford* Charity Act, Lord *Eldon* held that they must elect under which act they would proceed, because, by the particular act, the judgment of the lord chancellor was final; but under the 52nd Geo. III. c. 101 (*q*), it is subject to appeal. The court cannot proceed under two jurisdictions, and give a judgment which is final and *not* final (*r*).

Although the *Bedford* Charity Act authorised the court, in the instance of misconduct of the trustees of the charity, to interfere on the petition of any person or persons, Lord *Eldon* held, that in judicial construction those words did not include persons who had no interest in the funds (*s*).

The court has no power to give costs in proceeding under

(*p*) *In re Bedford Charity*, 5 Sim. 578. See 2 Swanst. 470, 523; *Attorney General* v. *Corporation of Bedford*, 2 Ves. sen. 505.

(*q*) *Ante*, p. 481.

(*r*) *In re Bedford Charity*, 2 Swanst. 518.

(*s*) Ibid, 525.

the summary powers of an act of parliament, unless express power for that purpose is given (*t*).

By stat. 39 Geo. III. (for effecting an exchange of lands belonging to the free grammar school of *Wotton-under-Edge*), it was enacted, that in case any difficulty should at any time arise, touching the application of the increased revenue arising to the charity, in consequence of the exchange, or thereafter to arise from the charity estate, or respecting any matter or thing in regard to the regulation or constitution of the said charity, or the ordinances thereof, it should be lawful for the master, patron, or trustees for the time being to prefer a petition to the lord chancellor, lord keeper, or lords commissioners of the great seal of *Great Britain*, who were thereby authorised and directed to cause the same to be heard in a summary way; and such orders as the Court of Chancery should make therein, or upon hearing thereof, should be observed and obeyed by, and should be final and conclusive to, all persons whomsoever (*v*).

(*t*) Ibid. 532. (*v*) See 17 Rep. of Commrs. of Charities, p. 345.

CHAPTER V.

OF THE CONSTRUCTION OF GIFTS TO CHARITIES, AND THE ADMINISTRATION OF THE FUNDS.

SECT. I.—*Favourable construction of Charitable Gifts.*

II.—*Cases where Charities are entitled to the whole Income of Estates, or to fixed payments only.*

III.—*The doctrine of Cy Pres, or approximation to the Donor's intention.*

IV.—*Of Bequests to Charity void for uncertainty.*

SECTION I.

Favourable construction of Charitable Gifts.

1. *Legacies to Charities favoured in the Civil Law,* p. 513.

2. *Defective assurances in favour of Charities aided in Equity,* p. 514.

3. *A Perpetuity may be created without words of Inheritance,* p. 517.

4. *Cases where neither Trustees nor objects are named, but there is a Reference to a future Appointment not made,* p. 518.

5. *Cases where no Trustees are named, but there is a Reference to a Class of objects without naming any Individuals,* p. 523.

6. *Cases of Bequests to Trustees for such Charitable Purposes as they in their discretion shall Appoint where Objects are, or are not named,* p. 524.

7. *Cases of Failure of Trustees and of Persons to select objects arising ex post facto,* p. 530.

1. *Legacies to charities favoured in the civil law.*] It is highly probable, that the rudiments of the law of charities were derived from the civil law. One of the earliest fruits of the Emperor Constantine's real or pretended zeal for Christianity, was a permission to his subjects to bequeath their property to the church (*a*). This permission was soon abused to so great a degree, as to induce Valentinian to enact a mortmain law, by which it was restrained (*b*). But this restraint was gradually relaxed; and in the time of Justinian, it became fixed, as a maxim of Roman jurisprudence, that legacies to pious uses, which included all legacies destined for works of charity, whether they related to spiritual or temporal concerns, were of peculiar favour, and to be deemed privileged testaments (*c*). The construction of testaments of this kind, was most liberal; and the legacies were never permitted to be lost, either by the uncertainty or failure of the persons or objects for which they were destined. Hence, if a legacy was given to the church or to the poor generally, without any description of what church or what poor, the law sustained it, by giving it in the first case to the parish church of the place where the testator lived; and in the latter case to the hospital of the same place; and if there was none, then to the poor of the same parish (*d*). And in all cases where the objects were indefinite, the legacy was carried into effect, under the direction of the judge having cognizance of the subject (*e*). So if a legacy was given for a definite object, which either was previously accomplished, or which failed, it was nevertheless valid, and applied under judicial direction to some other object (*f*).

The high authority of the Roman law, coinciding with the religious notions of the times, could hardly fail to introduce

(*a*) Cod. Theodos. lib. 16, t. 2, leg. 4.

(*b*) Cod. Theodos. lib. 16, t. 2, leg. 20.

(*c*) 2 Domat, lib. 4, t. 2, s. 6, l. 1, 2, 7, p. 168; Swinburne, part 1, s. 16, p. 105, 7th ed.

(*d*) 2 Domat, lib. 4, t. 2, s. 6, l. 4, p. 169.

(*e*) 2 Domat, lib. 4, t. 2, s. 6, l. 5, p. 169; Swinburne, part 1, s. 16, p. 104, 7th ed.

(*f*) 2 Domat, lib. 4, t. 2, s. 6, l. 6, p. 169, 170.

the principles of pious legacies into the common law of England; and the zeal and learning of the ecclesiastical tribunals, must have been constantly exercised to enlarge their operation. Lord *Thurlow* was clearly of opinion (*g*), that the cases of charities had proceeded upon notions adopted from the Roman and civil law, which were very favourable to charities; that legacies given to public uses not ascertained, should be applied to some proper object; and Lord *Eldon* in assenting to that opinion (*h*) observed, that all knew there was a period, when in this country a portion of the residue of every man's estate was applied to charity, and the ordinary thought himself obliged so to apply it, upon the ground that there was a general principle of piety in the testator. Be the origin, however, what it may, it cannot be denied, that many of the privileges attached to pious legacies have been for ages incorporated into the English law. Indeed, in former times the construction of charitable bequests was pushed to a most alarming extravagance; and though it has been in a great measure checked in later and more enlightened times, there are still some anomalies in the law on this subject which are hardly reconcilable with any sound principles of judicial interpretation, or the proper exercise of judicial authority.

2. *Defective assurances in favour of charities aided in equity.*] We have already seen that such a favourable construction of charitable gifts was adopted under the stat. 43 Eliz. c. 4, where the donor had ability to grant, that gifts which would have been void for other purposes, were carried into effect under that statute (*i*), by holding the heir of the testator a trustee for the charitable purposes.

The stat. 43 Eliz. c. 4, was held to supply all defects and want of form in assurances to charitable uses, where the donor had legal capacity and such an interest as might be the

(*g*) *White* v. *White*, 1 Br. C. C. 69; *Mills* v. *Farmer*, 1 Mer. 95.

(*h*) *Moggridge* v. *Thackwell*, 7 Ves. 12; *Fielding* v. *Bound*, 1 Vern. 230.

(*i*) *Ante*, pp. 245—247.

subject of disposition. Thus a devise of copyholds without any surrender to the use of the testator's will, was valid (*k*).

So where a testator had ordered his will to be engrossed, but being *in extremis*, signed the two first sheets of the draft, consisting of eleven sheets, and died before he could sign the rest; it was held to be a good appointment of copyholds which the testator had surrendered to the use of his will within the statute 43 Eliz. c. 4, although there were no witnesses to the signing (*l*).

A will made before the statute of wills (*m*) was held good, as an appointment within the statute 43 Eliz. c. 4 (*n*).

Although under the statute of wills (*o*) two-thirds only of lands held in socage or in capite could be devised, yet under the stat. 43 Eliz. c. 4, it was held that the entirety might be given by will to charitable uses (*p*).

A gift by a tenant in tail to charitable uses, without fine or recovery, bound the issue in tail (*q*), and the remainder man (*r*) or reversioner in fee (*s*).

So a tenant in tail might, before the stat. 9 Geo. II. c. 36, make a valid appointment of lands to charitable uses by a *will*, executed according to the statute of frauds (*t*).

Devises to corporations, which generally cannot take lands under a will, were held good, when made in favour of charities (*v*).

(*k*) *Woodford* v. *Parish of Parkhurst*, Duke, 70, (378); *Rivett's* Case, Duke, 74, (366); *Attorney General* v. *Andrews*, 1 Ves. sen. 225; *Attorney General* v. *Downing*, Ambl. 571.

(*l*) *Attorney General* v. *Saltwell*, 2 Atk. 497; See *Wagstaff* v. *Wagstaff*, 2 P. Wms. 258.

(*m*) 32 Henry VIII. c. 1; 34 and 35 Henry VIII. c. 5.

(*n*) *Rolt's* Case, Duke, 73 (368); Moore, 888.

(*o*) 32 Henry VIII. c. 1; 34 and 35 Henry VIII. c. 5.

(*p*) *Christ's Hospital* v. *Hawes*, Duke, 84 (370); *Jesus College* Case, 78 (363); *Higgins* v. *Southampton*, 3 Ch. Rep. 38; *Lord E. Montague's* Case, Duke, 78 (370).

(*q*) *Attorney General* v. *Rye*, 2 Vern. 453.

(*r*) *Tay* v. *Slaughter*, Prec. Ch. 16,

(*s*) *Attorney General* v. *Burdett*, 2 Vern. 755.

(*t*) *Jennor* v. *Harper*, Gilb. Eq. Rep. 44; *Ante*, pp. 246, 247.

(*v*) *Hellam's* Case, Duke, 80, (375); *Mayor of Bristol* v. *Whitton*, Duke, 81 (377); *Ante*, pp. 244—246.

So a devise to the mayor and chamberlain of *London*, to the use of the governors of *St. Bartholomew's Hospital*, was held valid, although the corporation is not incorporated by that name, but by that of mayor and commonalty (*u*).

So, although a devise of lands to churchwardens, who are not a corporation for taking lands (*w*), for a charitable use was void at law, it was held a good appointment within the stat. 43 Eliz. c. 4 (*x*).

A defective execution of a power was aided in equity, in order to support a charitable gift. As where a party, who had power to revoke a settlement by writing, under hand and seal, to be executed in the presence of three witnesses, desired, during illness, a deed of revocation to be prepared,

(*u*) *Mayor of London's* Case, Duke, 83 (380).

Although, from the time of Edw. VI. to that of James I., there were many decisions proceeding on nice and frivolous objections upon naming corporations in grants, a greater degree of liberality has obtained in modern times; and therefore where a corporation, entitled "The Wardein and Poore of the Hospitall of the Holy Trinitie in *Croydon*, of the foundation of *John Whitegift*, Archbishop of *Canterbury*," by deed under their common seal, in which they described themselves as "The Warden and Poor of the Hospital of the Holy Trinity in *Croydon*," omitting the name of their founder, conveyed part of the property of the charity, under the act, for the redemption of the land tax, it was held that the misdescription of the corporation in omitting the name of the founder was immaterial; and that if it had been material, it would have been cured by 54 Geo. III. c. 173, s. 12.—*Croydon Hospital* v. *Farley*, 2 Marsh. 174; *S. C.* 6 Taunt. 467.

Even where there is some omission, in the name of a corporation in a grant, it is competent to a court of law to inquire whether the grant was in fact made by the identical corporation in question; and if the deed is under their corporation seal, it will be valid.—*Croydon Hospital* v. *Farley*, 2 Marsh. 182; *S. C.* 6 Taunt. 480.

A devise of lands for the establishment of a school to "the right worshipful the mayor, jurats, and *town council* of *Rye*," was held sufficient to pass such lands to "the mayor, jurats, and commonalty of *Rye*," by which name they were incorporated, when it appeared to be the testator's intention to devise to that corporation.—*Attorney General* v. *Corporation of Rye*, 1 Moore, 267; *S. C.* 7 Taunt. 546.

(*w*) *Ante*, pp. 28, 29.

(*x*) *Pennyman* v. *Jenny*, Duke, 82 (374).

but died before it was done, having by will given part of the lands to charitable uses, it was held a good appointment (*y*).

But a disposition by an infant, feme covert, lunatic, or other person disabled by law to appoint lands to a charitable use, was void (*z*).

3. *A perpetuity may be created without words of inheritance.*] Although a legal fee cannot be created in individuals without the word *heirs*, or some equivalent expression, yet in the case of a charity, where form is not adhered to, the court will infer that a fee passed where the intention appears to constitute a charity which is to endure for ever. As where lands had been conveyed by feoffment to churchwardens and overseers and their successors for ever, who could not take as a corporation, and to an individual by another feoffment, without words of limitation (*a*).

Under a bequest to the Latin school of a parish, if any man is possessed of it that teacheth boys, and is richly grounded in the Latin tongue, the sum of 5*l.* to be paid him yearly for teaching and instructing three boys, was held to be a perpetuity, as the testator did not give it to a particular schoolmaster but to the school itself; like the old case of a gift to the parish church of *St. Andrew, Holborn*, which was construed to be a gift to the parson and parishioners of that parish and their successors for ever (*b*).

Where a testatrix, before the statute of mortmain, gave to the master or pastor at the meeting-house at *Marloes* 50*l.*, absolutely to his own use; and then gave and bequeathed to *William Cock*, his heirs and assigns for ever, certain premises, describing them "chargeable nevertheless with an annuity of 10*l. per annum*, which I give to the minister belonging to the meeting-house at *Marloes* aforesaid; but if the

(*y*) *Piggot* v. *Penrice*, Gilb. Eq. Rep. 137; *S. C.* Com. 250; Prec. Ch. 471; 2 Eq. Abr. 191, pl. 6.

(*z*) *Bramble* v. *The Poor of Havering*, Duke, 83, (508); Herne on Charitable Uses, p. 176, 234; Hob. R. 136; *Jesus College* Case, Duke, 78, (363); Herne, 163.

(*a*) *Attorney General* v. *Corporation of Berwick-upon-Tweed*, Taml. 246.

(*b*) *Cheeseman* v. *Partridge*, 1 Atk. 436.

said house at *Marloes* should not be used as a meeting-house after my decease, then to the minister of any other place the protestant dissenters called *Baptists* shall meet in, provided it be in the parish of *Hemel Hempstead*," with power for the said minister to enter on the premises and distrain.

It was held that the gift was not confined to the person who was then minister, but that the annuity was a perpetual charge in favour of the ministers of the chapel for the time being in succession, upon any vacancy happening by death or otherwise (*c*).

4. *Cases where neither trustees nor objects are named, but there is a reference to a future appointment not made.*]—The court will exercise control over every species of trust. If there be a clear trust, but for *uncertain objects*, the property, that is the subject of the trust, is undisposed of; and the benefit of such trust must result to those to whom the law gives the ownership, in default of disposition by the former owner; but that doctrine does not hold good with regard to trusts for charity. Every other trust must have a definitive object. There must be somebody in whose favour the court can decree performance. But it is settled upon authority, which cannot be controverted, that where a charitable purpose is expressed, however general, the bequest shall not fail on account of the uncertainty of the object; but the particular mode of application will be directed by the king in some cases, in others by the Court of Chancery.

The same words in a will, when applied to the case of individuals, may require a very different rule of construction from that which would govern them if applied to the case of charity. If a testator gives his property to such person as he shall thereafter name to be his executor, and afterwards appoints no executor; or if, having appointed an executor, he dies in the testator's lifetime, who appoints no other to supply his place; in either of these cases the testator must be held to die intestate, and his next of kin will take the estate; but to

(*c*) *Attorney General* v. *Cock*, 2 Ves. sen. 273.

give effect to a bequest in favour of charity, the court will in both instances supply the place of an executor, and carry into effect that which, in the case of individuals, must have failed altogether.

It has been already shown, that where there is a general indefinite charitable purpose, not fixing itself upon any particular object, the disposition is in the king by sign manual; but where the gift is to *trustees*, with general or some objects pointed out, the Court of Chancery will take upon itself the execution of the trust (*d*).

We now proceed to cases in which neither trustees nor objects are named, nor persons to select those objects, but the testator gives the legacy to such charitable purposes as he should by a *future instrument* in writing appoint, but fails to make any appointment; in such case the court will carry the charitable purpose into effect by appointing the objects to be benefited according to a scheme to be settled by the master. This doctrine appears to have originated in the following *dictum* in Freeman's Reports. "It was said, and not denied, that if a man deviseth a sum of money to such charitable uses as he shall direct by a codicil to be annexed to his will, or by a note in writing, and afterwards leaves no direction, neither by note nor codicil, the Court of Chancery hath power to dispose of it to such charitable uses as the court shall think fit: and so it was held in the case of Mr. *Siderfin's* will, and in the case of one *Jones;* but if the will points at any particular charity, as for maintenance of a schoolmaster or poor widows, then the Court of Chancery ought not to direct it to any other purpose but such as is pointed at by the will; as if the devise should be for such school as he should appoint, and appoints none, the court may apply it for what school they please, but for no other purpose than a school, although it may be for what school the court thinks fit" (*f*). Lord *Eldon* said, that he did

(*d*) *Moggridge* v. *Thackwell*, 7 Ves. 36; *Ommanney* v. *Butcher*, Turn. & Russ. 270; *Ante*, pp. 269, 270.

(*f*) 2 Freem. C. C. by Hovenden, 330; 1 Mer. 59, n.

not know any case deciding that proposition so largely as it is there stated, that *Siderfin's* case (*g*) did not, and the case of *Jones* referred to in *Freeman*, was not known; but although no decision had gone to the extent of the doctrine there stated, it might be safely affirmed that no case had determined it not to be law, and it had been cited as authority in almost every case of charity that had since occurred. How far the *dictum* of *Freeman*, from its antiquity of considerable authority, is to be supported if this case, (*Mills* v. *Farmer*), be taken to the House of Lords, is another question, but much consideration will be required before we can come to a conclusion against it at this day (*h*).

In *Wheeler* v. *Sheer* (*i*), a testator after giving several legacies, gave to his executors the residue of his estate upon trust, that they should employ it *to such charitable purposes as by codicil he should appoint*. By a codicil to his will he revoked some legacies and gave others, but named no charitable purposes, and went on to direct, that the residue given by his will should be applied to such uses and purposes as by any other codicil, or codicils should be directed. He afterwards made a second codicil, still referring to the bequest in his will, but naming no charitable purposes; and finally a third, containing no direction as to his personal estate whatever; and died soon after. Lord *King*, C., held, that where a man devises to such charitable uses *as he had appointed*, that supposes he had made an appointment, though it is not to be found; but here it was plain, the testator had made no appointment, and only had in his thoughts to do so. Lord *Thurlow* (*k*) treated this case as one in which there was no appointment, but the testator had procrastinated the legacy; that evidence satisfied Lord *King*, that the testator had not so fixed his mind as to separate the legacy from the personal fund, and he would not carry the charity into execution. But Lord *Eldon* said (*l*), that "he had examined the last case with great anxiety, and after all the atten-

(*g*) *Ante*, p. 270.
(*h*) 19 Ves. 487, 488.
(*i*) Mos. 288—301.
(*k*) 1 Br. C. C. 15.
(*l*) 1 Mer. 91.

tion he had given it his notion was, that if that case had stood upon the will only, it would have fairly raised the question, whether the note in *Freeman* (*m*) is law; but the circumstance of the codicil made afterwards, naming purposes in general, and not charitable purposes as had been done by the will, alters the case in a point so essential as to render it of no authority in deciding the question at issue in *Mills* v. *Farmer*; and his opinion was, that the case of *Wheeler* v. *Sheer* must have been decided upon the principle, that the first intention expressed by the testator, was overruled by his second intention; and consequently that the rule of law applicable to cases of charity, had there no place."

In the case of *Mills* v. *Farmer* already referred to, a testator by his will in 1806, in the first place, directed all his just debts and funeral expenses, and all the legacies which he should give by his said will, or by any codicil, to be paid as soon as possible after his decease; and then after giving several pecuniary legacies to a considerable amount, to certain of his relations and other persons, and after appointing the defendant and another his executors, with equal legacies, proceeded in the following words: "The rest and residue of all my effects, I direct may be divided for promoting the gospel in foreign parts and in England, for bringing up ministers in different seminaries, and other charitable purposes as *I do intend to name hereafter*, after all my worldly property is disposed of to the best advantage."

Afterwards, in 1807, the testator addressed a letter to his executors, stating where his will was, and requesting them to accept 500*l.* each in lieu of what he had bequeathed to them, and to divide his wine between them; and that certain other persons named in the letter, might receive some other specific and pecuniary legacies, and concluded thus:— "It is needless to have any of my relations attend my funeral, as it is apt to breed ill will amongst them; and their grief on such occasions is generally attended with hypocrisy: therefore, be pleased to accept of these trifles with my best wishes; and I pray that God may guide you."

(*m*) *Ante*, p. 519.

The testator died after writing this letter, which was proved by his executors, together with the will, as a codicil thereto.

A bill having been filed by the next of kin of the testator, praying an account and distribution of the residue, as being undisposed of by the will and codicil of the testator, and the attorney general claiming the residue as given to charity, Sir *W. Grant*, M.R., said, "that so far from its being a case upon which there could be no doubt of its being a bequest substantially to charity, he was clearly of opinion that it must be held void for uncertainty: for that, in the first place, two or three vague objects of charity were mentioned, between which, so named, and other objects of charity which he professed a design of naming afterwards, the testator expressed a *future intention* to divide his property;" and asked, "how it was possible to say, in the absence of all subsequent specification, what portion the testator intended to give to the purposes he had named, and what portions to those which he intended to name, but did not name? How could it appear whether he intended to give a fortieth, or a fiftieth, or a hundredth part to both or either of the purposes mentioned?" therefore declaring "that, as well on those grounds as also from the plain meaning of the clause, as altogether referable to a future specification of particulars never afterwards made, the clause must be decreed to be void for uncertainty" (*n*).

Upon appeal, Lord *Eldon* overruled the decree and supported the legacy; and said, the question was, whether the next of kin were to take one-third, and the two charities named were to take the residue in some way between them; or whether the true intention must not be taken to be to give to charity, going the length of naming two objects, and intending to name others, but not having done so; and the judgment to which he was very reluctantly driven, by the spirit of all the precedents, was, that it was a bequest to charitable purposes; and, being so, a scheme must be laid before the master for the purpose of distributing the fund, having regard particularly

(*n*) *Mills* v. *Farmer*, 1 Mer. 55—57.

to those two objects named; and that part of the decree which declares the residuary bequest void for uncertainty, must be reversed. All the costs must be paid out of the estate as between attorney and client (*o*).

This case is distinguishable from that of *Vezey* v. *Jamson*, already stated in a former part of this work (*p*), by the circumstance of the property having been given exclusively to charitable purposes, whereas, in the latter case, it was to be applied to charitable or *public* purposes.

Where a legacy was given to the *Guernsey Hospital* (there being two hospitals there), and the master reported that he could not find that any hospital in particular was intended by the testator, it was held that the legacy was not void for uncertainty, but was well given to a charitable purpose, which it was the duty of the court to direct to be applied (*q*).

5. Cases where no trustees are named, but there is a reference to a class of objects without naming any individuals.] We have already seen that a bequest to the poor inhabitants of a place was held valid, and confined to such as did not receive alms (*s*); and that a gift for putting out poor relations as apprentices, was established as a charitable gift (*t*).

(*o*) *Mills* v. *Farmer*, 19 Ves. 490, 491; *S. C.* 1 Mer. 55—104.

The decree of the master of the rolls, so far as related to the bequest of the residue to charitable purposes, was reversed. The master was directed to approve of a proper scheme for the distribution of the residue of the testator's personal estate, having regard particularly to the two institutions named in the will, the attorney general and the defendants (the executors) to lay proposals before the master for that purpose; the master to inquire and state to the court whether any and which of the next of kin of the said testator, within the statutes for the distribution of intestate's estates were objects of charity within the scope of the testator's will; and, if so, such next of kin to be at liberty to lay a scheme before the master to propose themselves objects of such charity.—*Mills* v. *Farmer*, 1 Mer. 722; Reg. lib. B. 1815, fol. 871.

(*p*) *Ante*, p. 84.

(*q*) *Simon* v. *Barber*, 2 Russ. & M. 112. See *Masters* v. *Masters*, 1 P. Wms. 425; *Attorney General* v. *Hudson*, Ibid. 674.

(*s*) *Attorney General* v. *Clarke*, Ambl. 422; *Ante*, p. 63.

(*t*) *White* v. *White*, 7 Ves. 423; *Ante*, p. 64.

So where a testator bequeathed the residue of his estate "to the widows and children of seamen belonging to the town of *Liverpool.*" On a bill filed for the directions of the court as to the application of the residue, the next of kin of the testator insisting that the bequest was void for uncertainty, it was referred to the master to inquire whether there were any and what charitable institutions for the benefit of the widows and children of seamen belonging to the town of *Liverpool.* The master by his report found, that besides other charities for poor seamen's widows, and for the poor of *Liverpool* generally, that a testatrix by will, dated June, 1778, directed the residue of her estate to be continued at interest, or placed out on government securities at the discretion of her executors, and after their death, of the rectors of *Liverpool* for the time being; the interest to be paid and distributed unto and among such poor sailors' widows and orphans, inhabitants of *Liverpool,* as should in their judgment be deserving objects of charity. Sir *W. Grant,* M. R., held the bequest valid and sufficiently descriptive of the charities mentioned in the master's report, and decreed the residue to be paid to the then rectors of *Liverpool,* to be by them laid out in their names at interest; and upon their death or resignation to their successors, rectors of *Liverpool,* for the time being—the interest to be applied by them for the benefit of widows and children of poor seamen belonging to the port of *Liverpool,* in like manner as the proceeds of the property given by the will, mentioned in the report, and applied according to such will (*v*).

6. *Cases of bequests to trustees for such charitable purposes as they in their discretion shall appoint where objects are, or are not named.*] In general, where there is a trust or power, whether arising on a legal estate, or reserved to be exercised by trustees, barely according to their discretion, the court will not exercise such discretion in the place of the trustees; the rule being, that though the court will supply a *defective*

(*v*) *Powell* v. *Attorney General,* 3 Mer. 48.

execution, yet it will not for any purpose supply the *non-execution* of a power (*u*).

Where trustees have a power to distribute a fund generally according to their discretion, without any object pointed out, or rule laid down, the court will not interpose; but in the case of charity, the court will exercise a discretion as having the general government and regulation of charity (*w*).

In *Cook* v. *Duckenfield* (*x*), the testator gave his real estate to his son in tail; and if he died a minor without issue, to five trustees, "for such charitable uses and purposes as he should direct by codicil or otherwise;" and gave his personal estate to the same trustees, to pay some legacies, and for the benefit of his son; but if he died under age (as the event happened), then he directed the residue of his personal estate to be "disposed of among widows and orphans of dissenters, and to his *poor relations*, in such proportions as his trustees, whom he appointed executors, should think fit." By a codicil, he gave his trustees power to sell his real estate, and in case his son died a minor or without issue, then the trustees were to dispose of the purchase money to such uses, intents, and purposes, as he should by any writing or memorandum direct, and for want thereof, as they the said trustees should judge fit and convenient. Lord *Hardwicke* considered the charitable purpose applicable to the real estate so devised, observing, that all objections arising from want of objects or from certainty of time, were easily obviated, upon construing the testator's intention to be in favour of charity; because, if the trustees had misapplied or abused their power, they might have been called to an account by any person in the name of the attorney general, for the benefit of the charity. The defendants were directed to lay a scheme before the master for applying the testator's estate to such charitable uses and purposes as should answer the intention of the testator, and also for the application of

(*u*) *Duke of Marlborough* v. *Lord Godolphin*, 2 Ves. sen. 61; *Brown* v. *Higgs*, 4 Ves. 708, 5 Ves. 495. See Sugd. on Powers, Chap. VI.

(*w*) *Gower* v. *Mainwaring*, 2 Ves. sen. 89.

(*x*) 2 Atk. 562, 567.

the rents, and of the money to arise by a future sale of the estates; and in this scheme, the defendants were to have a particular regard to the *poor relations* of the testator, and their circumstances (*y*).

Where a testator by will left several sums of money to be distributed in charities therein described, at the discretion of his executors, naming three, one of whom died before the filing of the information; and the question was, whether that was only a bare authority in the executors, or coupled with an interest; Lord *Hardwicke* was of opinion, that the executors, as taking the whole personal estate, out of which the charities were to issue, had an authority coupled with an interest, as executors had been always held to have in the case of legacies; and therefore the power of nominating the several persons who were to partake of the charity, was continued to the survivor. But though it was such an authority coupled with an interest as would survive, yet it was so far a trust, that in case of misbehaviour, the court might interpose; for it must be allowed that the court has a particular free and extensive jurisdiction in the case of a charity, and not confined to the proper or formal methods of proceeding requisite in other cases. But it was held, that the executors could not divide the charities into three parts, and each executor nominate a third absolutely; because the determination of the property of every object was left by the testator to the direction of all the executors; and so much of the information as sought a specific performance of a pretended agreement for that purpose, was dismissed with costs to be paid by the relators (*z*).

The residue of monies and securities for money were bequeathed to the defendants in trust, to lay out the same and pay the interest, &c. "to the *poor inhabitants of the parish of St. Luke* for ever." The will contained a power of appointing new trustees.

(*y*) *Cook* v. *Duckenfield*, 2 Atk. 562—699; Reg. lib. A, 1743, fol. 283; cited by Lord *Eldon*, 7 Ves. 85.

(*z*) *Attorney General* v. *Gleg*, 1 Atk. 356; *S. C.* 1 West's Rep. temp. Hardw. 491.

By a private act of parliament, it was enacted, that all gifts, donations, benefactions, and sums of money which should thereafter become payable to the use of the poor of the parish, not being directed or liable to be applied for the support of any private or particular poor or charity, or by the respective donors, *or otherwise particularly appropriated*, and not being sacramental money, should be paid into the hands of the treasurer of the guardians of the poor, thereby appointed in aid of the rate, with power to appropriate it to indigent persons who had not become chargeable.

Upon a suit for carrying the will into execution, it was insisted, on behalf of the said guardians of the poor, that the gift belonged to their treasurer for the time being, to be appropriated according to the directions of the act. It was decided by the court that the appropriation was within the meaning of the act, and that the distribution of the fund could not be taken out of the hands of the trustees named in the will, for the purpose of giving it to the guardians of the poor under the act (*a*).

Where a bill was brought by the alderman and principal inhabitants of the ward to have the directions of the court for the application of 200*l.* given by a will "to the ward of *Bread Street*, according to Mr. ———, his will," the lord chancellor refused to allow parol evidence to explain the testator's intention as to the blank; although the alderman and inhabitants of a ward are not, in point of law, a corporation, yet the attorney general being made a party to support the charity, it was decreed that the money might, from time to time, be disposed of in such charities as the alderman for the time being and the principal inhabitants should think the most beneficial to the ward; and it was directed that the plaintiff should lay a scheme before the master for the application of the 200*l.* and interest to some charitable use, for the benefit of the said ward (*b*).

A residuary bequest was made in these words, "All the remainder of my different bequests I give and bequeath to the

(*a*) *Attorney General* v. *Freeman*, 5 Price, 426; *S. C.* Dan. 117.

(*b*) *Baylis* v. *Attorney General*, 2 Atk. 239.

Archbishop of *Canterbury* and the Archbishop of *York*, for the time being, in trust for charitable purposes; and any thing not specified I commit to the discretion of my executors." After some legacies to servants, the will concluded thus: "I desire my executors to make some donations out of my property to the poor of the different places where I have estates, besides those already mentioned." One of the questions upon further directions was, whether the general residue passed to the archbishops for charitable purposes, or to the executors under the words "any thing not specified, &c.," or to the next of kin, as undisposed of. Lord *Eldon* decided that the general residue passed to the archbishops for charitable purposes; and held, that after the donation to be made by the executors to the poor, the extent of which was almost unlimited, the general residue was to go to charitable purposes, according to a scheme to be settled by the master (*c*).

So where a testator gave a sum of stock to trustees, and showed a clear intention to dispose of the whole of the dividends for the benefit of charitable institutions, and did in fact specify some of them, and the yearly sum to be paid to them, but left blanks for the names of others, and for the sums to be paid to them, the court referred it to the master to approve of a scheme for the application of the remaining dividends (*d*).

A testator gave his residuary personal estate to trustees, named in his will, their executors, administrators, and assigns, upon trust, to apply the same as he should appoint; and, in default of appointment as to any part, he left it "to his said trustees to settle such part thereof, either to or for charitable or pious purposes, at their discretion, or otherwise for the separate benefit of his sister, independent of her husband, and all or any of her children, in such manner as his said trustees should think fit, and so that his brother-in-law should have no interest whatsoever therein."

The testator died without making any appointment of his residuary estate; and, after his death, his trustees and executors

(*c*) *Paice* v. *Archbishop of Canterbury*, 14 Ves. 371.

(*d*) *Pieschel* v. *Paris*, 2 Sim. & Stu. 384.

applied a part of it for the benefit of his sister and her children, and they settled some other portion of it for charitable uses; but the survivor of them died, leaving a sum of 500*l.* which had not been applied either to charitable purposes or for the benefit of the testator's sister and her children; and the questions in the cause were, first, whether the representative of the surviving trustee could exercise the discretion given by the testator; secondly, whether the fund was undisposed of; and, thirdly, whether the fund was applicable to charitable purposes, under the direction of the court.

Sir *John Leach*, M. R. said, "where a disposition is made in favour of charity and the trustee fails, the court will interfere and execute the trust: but here no disposition is made in favour of charity as to the unappointed part. The trustees had a personal discretion as to the application of the fund; and as they have died without exercising that discretion, this part of the property is undisposed of by the testator, and belongs to the next of kin" (*e*).

A bequest of annual sums to different persons, "to be distributed in charity, according to their own discretion and judgment, either to private individuals or public institutions, in such sums, way, and manner as the individuals named shall from time to time think fit, without the interference or control of any person whatever," was held a good disposition to charitable purposes; and the court declared that the distribution of the several charitable bequests was left to the absolute discretion of the several legatees, and declined directing any scheme, leaving to any party liberty to apply as there might be occasion (*f*).

Where a testator gave to his trustees 2000*l.* *per annum*, to lay out at their discretion till his son came of age, "in the service of my Lord and Master, and, I trust, Redeemer," it was contended that the discretion meant was as wide as the accidental application in the testator's lifetime, of bounty which it was impossible to measure or define, or for the court

(*e*) *Down* v. *Worrall*, 1 Mylne & Keen, 561.

(*f*) *Horde* v. *Earl of Suffolk*, 2 Mylne & Keen, 59.

to control. The court having held that the bequest was valid, it remained only to decide whether the trust should be executed by referring it to the master to settle a scheme, or by leaving it to the trustees to exercise their discretion as the will directed, under the control of the Court of Chancery. The latter was thought to be the proper course, because the will directed it, and the trust was of a temporary nature; although Lord *Manners* expressed great doubt on both questions, and a hope that the case would be carried to the House of Lords. It was declared that the bequest of 2000*l.* a-year was a good charitable devise, and a valid charge on the real estates; and directed the trustees and executors to lay out and expend that sum annually during the period aforesaid at their discretion, in such charitable uses as aforesaid (*g*).

7. *Cases of failure of trustees and of persons to select objects arising ex post facto.*] It is a general rule, that a legacy given in trust does not lapse by the death of the trustee in the testator's lifetime, but survives for the benefit of the *cestui que trust;* the substance of the charity remains notwithstanding the death of the trustees in the testator's lifetime, though at law the legacy lapses. The circumstance that the trustee is prevented by death from disposing of a fund given to charity, makes no difference; because, a *power* only is given. Where there is no gift, but only a power to give to certain charities, they will survive notwithstanding the death of the trustee in the testator's lifetime (*h*).

In *Attorney General* v. *Hickman* (*i*), a testator having by his will given his estate to B. his heirs, executors, and administrators, by a codicil, declared the trust in these words: "I would have the same employed for the encouraging such nonconformist ministers as preach God's word in places where the people are not able to allow them a sufficient and

(*g*) *Powerscourt* v. *Powerscourt*, 1 Molloy, 616; *ante*, p. 74. See *Waldo* v. *Caley*, 16 Ves. 206.

(*h*) *Moggridge* v. *Thackwell*, 1 Ves. jun. 475; *S. C.* 3 Br. C. C. 517.

(*i*) 2 Eq. Ca. Abr. 193, pl. 14; *S. C.* W. Kelynge Cas. Ch. 34; cited 1 Br. C. C. 15; Wilmot's Notes, 25; 7 Ves. 57.

suitable maintenance, and for encouraging the bringing up some to the work of the ministry, who are designed to labour in God's vineyard among the dissenters; the particular method how to dispose of it I prescribe not, but leave it to their discretion; designing you (meaning B.), to take advice of C. & D." B. C. and D. having died before the testator, it was objected that the legacy had lapsed. But it was held by the court, that B. was only a trustee, and to whom C. & D. were recommended as fit persons to assist him in the execution of the trust; and though by the death of B. C. & D. the legal estate of the charity was gone, and the charity could not be disposed of by the very hands which the testator designed should have done it, yet the charity itself, which is the substance and reason of the devise, was still subsisting, and might be answered as fully by the aid and directions of the court, as if the legatee and his counsellors were then alive. And an account of the personal estate was decreed, and the same to be distributed immediately, and not made a perpetual charity.

The last case shows to what a length the courts have gone in favour of charity, for it was left totally uncertain by the testator what portion any one was to take—what charity —and by what mode—and he had taken no means to ascertain it, but what had altogether failed by the death of all those persons; and yet the court said, they would intrust themselves with the discretion, which was left personally to others, upon the ground that charity was the essence and substance, and the mode of carrying it into effect only a shadow (*k*).

A charitable gift will not fail by the testator's erasing the name of the executor to whom he had intrusted the appointment of the fund. Thus where a testator being possessed of a considerable personal estate, by his will dated 6th October, 1769, after giving various legacies, disposed of the residue of his estate as follows: one moiety thereof to the *Foundling Hospital*, and the other moiety to the *Lying-in*

(*k*) See 7 Ves. 80.

Hospital, and if there should be more than one of the latter, then to such of them as the executor shall appoint. He then appointed an executor, but afterwards struck out his name, and died without having appointed any other executor. The plaintiff proved the will as a testamentary paper, and obtained administration with the paper annexed as one of the testator's next of kin.

The defendants were the other next of kin, and the governors of the *Foundling Hospital* and of the several *Lying-in Hospitals*. The plaintiff insisted that the bequest of the moiety to the *Lying-in Hospital* became void by striking out the name of the executor who was to appoint; and that it should be referred to the master to report who were entitled as next of kin, and offered to account under the direction of the court. The defendants, the next of kin, also claimed that moiety, the bequest being void. The governors of the *Foundling Hospital* claimed the moiety bequeathed to them. The governors of the several *Lying-in Hospitals* submitted their several claims. Lord *Thurlow* held, that the only question was, how the trust as to the residue should be carried into execution; and referred it to the master to state to which of the *Lying-in Hospitals* it should be paid (*l*).

Generally, a legacy given in trust does not lapse by the death of trustee in the testator's lifetime; so where a *power* only is given to dispose in charities, whether particularly named or in general terms, the charities survive and will not fail by the death of the person to whom the power was given in the lifetime of the testator.

In *Moggridge* v. *Thackwell* (*m*), the testatrix, after giving (amongst others) legacies to several hospitals and infirmaries named in the will, proceeded thus: "And I give all the rest and residue of my personal estate unto *J. Vaston*, gentleman, his executors and administrators, desiring him to dispose of the same *in such charities* as he shall think fit, recommending poor clergymen who have large families and

(*l*) *White* v. *White*, 1 Br. C. C. 12.

(*m*) 3 Br. C. C. 517; *S. C.* 1 Ves. jun. 464.

good characters; and I appoint the said *John* and Mr. *Vaston* before mentioned, executors of this my will; and I desire R. W. Esq., and the aforesaid Mr. R. W., to aid and assist my executors." The testatrix in her fourth codicil thus expressed herself: "My will I shall order to be sent with this, but my executors need not hurry themselves in any shape, but take their own time to do whatever must be done; and employ Mr. *Lawrence*, or any other Mr. *Vaston* thinks more proper, to do the writing part of the business. I hope it will be quite unnecessary for my executors to come into the country, unless it is their own choice." The decree, as it was finally pronounced by Lord *Thurlow*, upon a motion to vary the minutes, declared that the residue of the testatrix's personal estate passed by her will, and ought to go and be applied in charity, regard being had to poor clergymen with good characters and large families, according to the recommendation in the will; and that the master should approve of a scheme to effectuate the purposes of the said charity, with liberty for the parties to lay proposals before him for that purpose. The residue of the personal estate amounted to 50,000*l.*

By the scheme submitted by the plaintiff, the executor and the next of kin, and approved by the master, it was proposed that the defendant *Thomas Walker*, first cousin and heir-at-law of the testatrix *ex parte maternâ*, might be allowed out of the residue of the testatrix's personal estate 5000*l.*, under the particular circumstances of his case; and that small annuities should be granted to several other persons, who were either relations of the testatrix, or were in her life dependent on her bounty; that a school might be established at *Dymocke*, the residence of the testatrix and her family, for poor children of that parish; that 1000*l.* might be appropriated in aid of the *Gloucester* Infirmary; 1000*l.* in aid of an intended lunatic asylum at *Gloucester;* that 6000*l.* 3 *per cent.* bank annuities might be transferred, and the dividends appropriated to a charity instituted in aid of the distribution annually made for the relief of widows and orphans of clergymen in the diocese of *Gloucester*, to be ap-

plied for the relief of poor clergymen who had large families and good characters, according to the rules of distribution of the said institution; and lastly, that the residue and remainder of the said funds, and of all the testatrix's personal estate, should be called "Mrs. *Ann Cam's* benefaction to poor clergymen," and should be invested in the 3 *per cent.* consol. bank annuities, in the name of the governors of the charity for the relief of poor widows and children of clergymen; and that the interest and dividends should be applied by the said governors in or towards the relief of poor clergymen with good characters and large families, according to the recommendation in the will.

Upon a rehearing before Lord *Eldon*, it was contended on behalf of the next of kin, that the case was not a general indefinite trust for charity without any object specified by the testatrix, but a personal confidence confined to *Vaston*, that could not be transferred to any other person, nor exercised by the court; that such charity only was to take as should be created by him; and if there should not be any such, then it was to be considered as if the residuary legatee had died in the life of the testatrix. That an option only was given to *Vaston*, and not a trust reposed in him; and that even if the property did not go to the next of kin, it was to be disposed of by the king's sign manual, and not by a scheme to be settled by the master.

For the plaintiff, the executor, it was contended, that *Vaston* was a trustee; and that notwithstanding his death in the testatrix's lifetime, which was known to her, the inference was, not that she meant the legacy for charitable purposes should be void, but that she still intended the general application to survive him, and to be carried into effect in legal course, which in this case was by a scheme to be settled by the master. It was contended for the attorney general against the next of kin, that the decree was wrong in directing a scheme; the charity in this case being of such a general nature that the disposition fell to the crown.

Lord *Eldon* admitted, that the will in terms manifested as strong a purpose to place discretion in an individual, as

could be expressed by any terms; but notwithstanding that it seemed to him the cases had gone a length, upon principles wise or otherwise was not for him to determine, which had formed a precedent, that bound him in the Court of Chancery; and whatever the House of Lords might think proper to do upon a review of the cases, it was much better, if they were to be departed from, that they should be departed from by the authority in the last resort, than by an individual judge sitting there.

The case was not argued merely upon *Vaston's* death. Lord *Eldon* agreed with Lord *Thurlow*, that it made no difference; for the question was, what the testatrix must be taken to have meant, if she had died immediately after the will was executed; and it was infinitely difficult to contend, that the court could construe it otherwise, because he died in her life, than if he had outlived her. It is said, if he had, he would have had all his life to select the charities. His lordship doubted that extremely; it was assuming the question; for the case of *Attorney General* v. *Gleg* (*n*) proved, that the court at least would call upon him to act. The question would arise exactly in the same way; for if he had survived her, and had addressed himself to the execution of the trust, and had died suddenly while about it, and before he had completed it, the mode would have failed precisely, as by his death before her; for unless the means by which it was to be executed were effectuated by his act, the circumstance of his dying before her could make no difference as to the question whether the court would supply other means. The question resulted upon the whole, did she intend he should be a trustee for charity? "If the authorities," observed his lordship, "are to stand, though I had for ten years a strong persuasion upon this will, that she meant the objects should be selected by him only, I must check such conjectures by attention to the rules upon which the court acts with regard to charities; and I am reluctantly driven to say, there is no substantial difference between these words, in which she has bequeathed

(*n*) 1 Atk. 356; *S. C.* Amb. 584. *Ante*, p. 526.

to *Vaston*, to dispose in such charities as he shall think proper, and the words in which it was expressed in the *Attorney General* v. *Hickman* (*o*). Those cases call upon me to say, the general intention of this testatrix, who seems to have been saturated and satiated with the idea of charity, and yet not to have had mind enough herself to determine upon the particular objects, was to devote her property to charity; and according to these precedents, *Vaston* was only the means and instrument by which that general intention was to be executed; and therefore, this court will carry that general intention into effect."

The next question was, whether the charity was to be effected by a scheme to be settled by the master or by the king's sign manual (*p*). In many cases where all the trustees are dead, in others where some of them are dead, the discretion being wholly or partly gone, or where the surviving trustees would not act, or where some would and others would not, yet the court in a great number, if not in all those instances, did by a scheme distribute the fund. The run therefore of the cases, with the exception of the *Attorney General* v. *Herrick* (*q*), that have occurred, rather import, that where originally a trust is created for the distribution of a charity, and the trust is not carried into execution, because it was originally a trust, and not in a strict sense a general indefinite gift to charity; general and undefined or to the poor in general; the court would execute it by a scheme, and it was so decided (*r*).

Where the trustees appointed by the testator decline to exercise a discretionary power of distribution amongst certain objects, the court will administer the fund according to a scheme settled by the master. Thus where a testator, being seised of lands in fee, and also possessed of a considerable personal estate, by will dated 22nd of March, 1714, gave all his real and personal estate to two trustees and their

(*o*) *Ante*, pp. 530, 531.
(*p*) *Ante*, pp. 269, 270.
(*q*) Ambl. 712; *ante*, p. 272.
(*r*) *Moggridge* v. *Thackwell*, 7 Ves. 36—87, affirmed in House of Lords, 13 Ves. 416.

heirs, &c. in trust, to pay the produce to his niece for her life, with remainder for the benefit of her issue, as therein mentioned; and on failure of such issue (which happened), the trustees and the survivor of them, and the heirs, executors, &c. of such survivor, were directed "to dispose of his real and personal estate to such of his relations of his mother's side who were most deserving, and in such manner and proportions as they should think fit, to such charitable use as they should think most proper and convenient." One of the trustees having declined to act in the trust, on a bill filed by the niece a conveyance was made in pursuance of the decree of the court to a new trustee upon the trusts of the will. The niece having died without issue, on a bill brought by the testator's relations on the mother's side for their share of the estate, and on a cross bill by the attorney general to have the same applied to charitable uses as the court should direct, it was held that the limitation over of the personal estate was good, and that the power given by the will to the trustees of distributing the testator's estate as they thought fit, was at an end, and could not be assigned over; and that, therefore, the power of distributing the same devolved on the court; and the court directed that one-half of the said estate should go to the testator's relations on the mother's side, and the other half to charitable uses, the known rule of equity that equality is equity (*r*), being the best measure to go by. There being no rule of judging of the merits of the testator's relations, all were admitted without distinction, excluding only those who were beyond the *third* degree, and not allowing, as to the personal estate, any representation of those relations who died in the lifetime of the tenant for life: for, before her death, no part thereof vested in any of the relations, and it was contingent whether they would be entitled or not; and a case, determined by Lord *Cowper*, was cited, where one gave his personal estate "to his *relations, fearing God, and walking humbly before* him," which was decreed equally among his relations (*s*).

(*r*) See Francis's Maxims, 9—18. Vin. Abr. Charitable Uses (C), pl. 16; *S. C.* 2 Eq. Cas. Abr. 194, pl.

(*s*) *Doyley* v. *Attorney General*,

SECTION II.

Cases where Charities are entitled to the whole Income of Estates, or to Fixed Payments only.

1. *Where the whole rents are devoted to Charity.*
2. *Usage admitted in construing Charitable Gifts,* p. 562.
3. *Where the Donee of the Fund is entitled to the Surplus Rents, subject to Fixed Payments,* p. 567.
4. *Of the Acceptance of Estates given in Trust for Charities,* p. 595.

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1. *Where the whole rents are devoted to charity.*] In consequence of many charitable donations having been made at

15; cited 7 Ves. 58 n.; 10 Ves. 538; 16 Ves. 47; 3 Mer. 19.

The decree of the master of the rolls, after directing the usual accounts and arrangements of the testator's assets, directs as follows: "And what shall appear to be the neat surplus of the monies arising from the real and personal estate of the testator, the produce thereof, the same is to be divided into moieties; whereof one moiety is to be distributed, share and share alike, amongst all the relations of the testator on the mother's side, who are within the degree of third cousins, and were born at the death of *Elizabeth Wilson,* (*the tenant for life,*) and are now living; and as to the other moiety of the said estate, all parties are to be at liberty to propose schemes before the master for distributing the same out and out in charity; and herein the several poor relations of the said testator who shall not be partakers of the other moiety, are *cæteris paribus* to be preferred. The master to state to the court what would be the proper scheme, subject to farther directions."—1st Dec. 1735; Reg. lib. A. 1735; 7 Ves. 58 n.

By a report as to one moiety, forty-two relations were to receive 56*l.* 14*s.* 1½*d.* each. Upon further directions, it appears that the master certified by his report that he had, out of the several schemes laid before him, by consent of parties, made up one entire scheme for the other moiety out and out in charity, according to the terms of the scheme, viz.: 400*l.* to eight poor relations of the testator, the like sum to the *Westminster Infirmary,* and other sums to other public charitable institutions, and amongst others to the parishes in the town of *Guildford.*—Reg. lib. A. 1737, fol. 545; 7 Ves. 59 n.

a distant period, the value of estates devoted to charitable purposes has greatly increased since the deeds of foundation; and in many instances the corporations or trustees, in whom the estates were vested, have applied only so much of the rents as was originally appropriated, and retained the surplus for their own benefit. Hence many suits have been instituted for the purpose of compelling the application of the increased value to charitable purposes; and, in some instances, such trustees have successfully maintained that they were entitled to the surplus, after applying the particular sums mentioned in the gift; but, in other cases, it has been decided that the whole rents are applicable to charitable purposes. It is obvious that questions of this sort must depend upon the intention of the donor; and in order to ascertain upon what principles the courts have acted in deciding such questions, it will be necessary to examine the facts and circumstances of the decisions with some degree of minuteness.

In general the heir-at-law takes every interest in land which is not expressly given away (*a*); but that rule has not been followed in the case of charities. At the time when some early decisions were made in favour of charities, the doctrine of resulting trusts was not much understood, or it is probable that the right of the heir-at-law to the surplus rents would never have been defeated. Both Lord *Hardwicke* (*b*) and Lord *Eldon* (*c*) expressed an opinion that in former times the court acted upon principles in the construction of deeds and wills relating to charities, which, if they could be reconsidered, would not now be adopted. If the doctrine of resulting trusts had been then understood, the right of the heir-at-law would never, in all probability, have been got over (*d*).

In *Lloyd* v. *Spillet* (*e*), *John Stamp*, being seised of a con-

(*a*) See *ante*, p. 205.

(*b*) *Attorney General* v. *Johnson*, Ambl. 190; *Attorney General* v. *Herrick*, Ambl. 712.

(*c*) *Attorney General* v. *Mayor of Bristol*, 2 Jac. & Walk. 307, 312.

(*d*) See *ante*, p. 274.

(*e*) 2 Atk. 148; *S. C.* 3 P. Wms. 344.

siderable real estate, and possessed of a large personal estate, made his will in March, 1721; and by a codicil in October, 1721, appointed two trustees, to see what he had done in his lifetime be continued as he ordered, and then gave two of his cousins 15*l.* a-year a piece during their lives; and directed his trustees to improve all his estate to the best advantage, and that the yearly profits thereof should be given for the yearly maintenance of such ministers as were called Presbyterian and Independent ministers, that did not receive above 40*l.* a-year for their preaching. The testator afterwards added another trustee. On the 7th Dec. 1721, J. S. in consideration of natural love and affection which he bore to his three trustees (who were his cousins), conveyed several messuages and farms unto and to the use of them and their heirs, with a proviso that if the grantor should, during his life, tender or pay to his trustees 10*s.* on purpose to make void the said deed and estates thereby conveyed, then the deed and estates thereby limited should be void. J. S. by deed poll, in consideration of 10*s.* assigned all his goods and chattels to his trustees, and it was agreed that J. S. should have the rents and profits of the premises during his life, for the maintenance of himself and family; and a power was reserved to the grantor to make void that deed by any deed or writing, and to dispose of the premises as he should think fit; and he had power also to revoke the lease and release. On a bill brought by the heirs-at-law of J. S. for a conveyance of his real estate to them, and for the rents and their share of the personal estate, and to have the deeds delivered up, Lord *Hardwicke* held that both the legal and beneficial estate and interest passed, and that there was no intention of a resulting trust in favour of the heir-at-law; but that the whole design of the grantor was to secure the charity at all events. The power of revocation was a circumstance relied on by the court for showing that the grantor did not intend a trust for himself or his heir-at-law.

The question in cases of this kind is generally whether the property is given subject only to certain fixed payments, specified in the original gift, vesting the surplus in the donee

of the fund beneficially, or whether the increased value, however great, is to be applied from time to time for the objects of the charity in relative proportions, according to the original distribution. One mode of discovering the intention of the donor is by ascertaining whether the whole value of the property was, at the time of the foundation of the charity, distributed amongst the objects of the charity. The intention to be inferred from the circumstances of particular cases must often be matter of considerable doubt in different minds, although the same acknowledged principles of construction are adopted.

Where a testator has himself declared what constituted the whole value of the estate at the time of the foundation of the charity, the court, from the testator's knowledge of such value, and the distribution of the whole annual value of the property amongst the objects of the charity, has inferred an intention on his part that the whole income of the estate should be applied to charitable uses, although there has been a great increase in the value (*f*). Another rule of construction established in these cases, the soundness of which was doubted by Lord *Eldon*, is, that as the charity would lose if the fund decreased in value, it ought to gain in case it increased (*g*).

Lord *Eldon* said that if an estate be given to trustees, and notice taken that the payments to charity are less than the amount of the rents, that no case had gone so far as to say that the *cestui que trust*, even in the case of a charity, is entitled to the surplus—there would either be a resulting trust, or it would belong to the person who takes the estate (*h*).

Where an estate was devised for charitable purposes, with a direction that the rents should not be raised, it was held that such direction was void, and that there was no resulting trust for the heir-at-law as to the increased rents (*i*).

(*f*) 2 Russ. 441.

(*g*) 2 Jac. & Walk. 319; *Attorney General* v. *Sparks*, Ambl. 203.

(*h*) *Attorney General* v. *Mayor of Bristol*, 2 Jac. & Walk. 307, 308.

(*i*) *Attorney General* v. *Master of Catherine Hall, Cambridge*, Jac. Rep. 381, 395.

Where, by a will and codicils, real estates are devised to trustees, upon the trusts after mentioned, and those trusts are generally for charitable purposes, if the trusts do not appear to exhaust the whole rents of the property, it seems there will be a resulting trust for the heir-at-law; but where, from the whole tenor of the instruments, it can be collected that the intention of the testator is that all the rents are to be applied to the purposes of the trusts expressed, though such trusts appear to be insufficient to exhaust the whole fund, the heir will be disinherited; and there being a devise of a small parcel of land, at the end of the last codicil, to give an additional income to a schoolmaster of a school founded by the will of the testator, affords a presumption of an intention that the whole of the previously devised estates should be applied for the purposes of the trusts, to the exclusion of the heir (*k*).

It is established that though the object of the devise be to some future establishment of a use good in itself, but requiring the charter and license of the crown, the intermediate rents and profits will not belong to the heir-at-law, standing in the place of the ancestor; but at law they are applicable to the charitable use, if it be a legal one (*l*).

A devise of the *rents and profits* of lands will in general pass the lands themselves. As where a testator, having let lands and houses for years, reserving rents, made his will in the following words: "As concerning the disposition of all my lands and tenements, I bequeath the rents of D. to my wife for life remainder over in tail," it was held that the *reversion* of the lands passed as well as the reserved rents (*m*).

Where a party having erected an almshouse for eight poor men, and being seised of lands then let at the annual rent of 10*l.*, devised "the rents of his said lands for the

(*k*) *Attorney General* v. *Wilson*, Roll's Court, 3rd March, 1834; Law Journ. 3 vol. N. S. 126.

(*l*) *Attorney General* v. *Bowyer*, 3 Ves. 726; *Porter's* Case, 1 Rep. 16; *Sutton's Hospital*, 10 Rep. 1.

(*m*) *Kerry* v. *Derrick*, Cro. Jac. 104; *S. C.* Moor, 771; 5 Mod. 63. See 1 Salk. 228; Owen, 6, 7; *Doe* d. *Goldin* v. *Lakeman*, 2 B. & Ad. 42.

maintenance of the said poor in the said almshouse;" the heir of the testator paid 10*l.* yearly for the maintenance of the poor at the almshouse, and on the expiration of the former lease, demised the land for 40*l.* *per annum.* On a reference by the lord keeper to the judges, whether if one devise the rents of his lands to a charitable use, the land itself did pass, they certified their opinions, that by a devise of the rents of the lands to a charitable use, the land itself did pass; for when one devises the rent of his land to a charitable use, it shall be taken largely for a devise of the rent then reserved, or afterwards to be reserved upon an improved value (*n*). For a gift of the yearly value is equivalent to a gift of the rents and profits; and a gift of rents and profits is equivalent to a gift of the lands themselves; and consequently the increase of the rents and profits will belong to those to whom the yearly value is given, *alias* the rents and profits, *alias* the lands themselves (*o*).

Where the case depends altogether upon the language of a will, and it is necessary to determine whether the surplus rents, after satisfying the purposes of the will, are to be at the absolute disposition of the corporation in which they are vested, or whether the corporation are intended merely to have a qualified disposition of the surplus rents to purposes of charity only, it is necessary to weigh every word of the will with the utmost attention, in order to collect from the whole context, the real intention of the testator (*p*).

The rule of law is, that if it appears upon the face of the instrument that the whole rents of an estate are given for charitable purposes, the subsequent increase of the rent beyond the sums specified shall be considered as devoted to the charitable purposes expressed; and also if, without any such apportionment of the whole of the rents of the estate at the time when the grant was made, there be upon the face of the instrument an express declaration that the whole of the profits of the estate shall be applied to charitable

(*n*) Case of *Kennington Hastings*, Duke, 71, (623).

(*o*) 2 Russ. 435.

(*p*) *Attorney General* v. *Skinners' Company*, 5 Madd. 204.

purposes, all the profits, how much soever they may be increased at any future time, are applicable to those charitable purposes (*q*).

One of the earliest cases upon this subject, is *Hynshaw* v. *The Corporation of Morpeth* (*r*), in which King Edward VI. gave land to the mayor and commonalty of *Morpeth*, of the annual value of 20*l. per annum*, to maintain a schoolmaster there. The value of that land increased to 100*l. per annum*, and the corporation continued to bestow on the schoolmaster only the 20*l. per annum*, according to the value at the time of the first gift; and the lord keeper said, that the not bestowing of the increased value of the land given, was a breach of trust in the corporation, if no other use be expressed in the letters patent. So it is laid down, that if land of the value of 3*l. per annum* be given to repair highways, and it afterwards increases in value to 11*l.*, the whole of it must be applied in the same manner (*s*).

If lands of the value of 3*l. per annum* be given to maintain a schoolmaster, and in the deed it is expressed that the said 3*l.* shall be only employed to maintain that use, and no other use is expressed in the deed, and afterwards the land increases to a greater value, all the increased rent shall be employed for that charitable use, because it doth not appear that the donor had any intention that the profits of his land should be employed to any other use, and at first he gave so much as the land was worth; and the commissioners might order the increased value to be applied to the charitable use (*t*).

A gift of the whole fund in fixed proportions to different objects of the charity, vests the whole in such objects, in such proportions, to the exclusion of the trustees through whose instrumentality the charitable purpose is to be effected. Thus in the case of *Thetford School*, lands were devised to trustees for the maintenance of a preacher four times a year, a master and usher of a school, and certain poor; and cer-

(*q*) *Attorney General* v. *Skinners' Company*, 5 Sim. 614, 615.

(*r*) Duke, 69, (242).

(*s*) *Eltham* v. *Warreyn*, Duke, 67, (641).

(*t*) *Sutton Colefield* Case, Duke, 68, (642).

tain sums were given to each (*i. e.* preacher, master, usher, and poor), amounting to 35*l.* a year, the whole of the rents and profits of the land at the time of the devise. It was held, because the *whole* rents were given to the objects of the donor's bounty, that the increase of the rents and profits was for that reason to be divided among them; and that the fixed payments specified should not limit the amount of the shares, though it ascertained the proportions in which those shares were to be received by them (*v*).

(*v*) Case of *Thetford School*, 8 Rep. 130 b, 131 b. As this case is of frequent reference, it is here stated verbatim. Upon a private bill exhibited in the parliament for the erection of a free-school, maintenance of a preacher, and of four poor people *scil.* two poor men, and two poor women, according to the will of Sir *Thomas Fulmerstone*, Knt. a question was moved by the Lords, and was such: land of the value of 35*l. anno* 9 Eliz. reginæ, was devised by will in writing to certain persons and their heirs, for the maintenance of a preacher four days in the year, of a master and usher of a free grammar-school, and of certain poor people; and a special distribution was made by the testator himself, in the same will, amongst them, of the revenues *scil.*: to the preacher a certain sum, and certain sums to the schoolmaster and usher, and to the poor people, amounting in the whole to 35*l. per annum*, which was the yearly *profit of the land at that time*; and afterwards the lands became of greater value, viz. of the value of 100*l. per annum*. Now two questions were moved, 1st, whether the preacher, schoolmaster, usher, and poor should have only the said certain sums appointed to them by the founder, or that the revenue and profit of the land should be employed to the increase of the stipend of the preacher, schoolmaster, usher, and poor? 2ndly, if any surplusage remained, how it should be employed; and it was resolved, on hearing of counsel learned on both parts, several days at *Serjeants' Inn*, by the two chief justices and *Walmsley*, justice (to whom the lords referred the consideration of the case), that the revenue and profit of the said land should be employed to the increase of the stipend of the preacher, schoolmaster, &c. and poor; and if any surplusage remained, it should be expended for the maintenance of a greater number of poor, &c., and that nothing should be converted by the devisees to their own uses. So in the case in question, where lands in *Croxton*, in the county of *Norfolk*, were devised by Sir *Richard Fulmerstone* to his executors, to find the said works of piety and charity, with such certain distribution as is aforesaid; and now the value of the manor was greatly increased, that it shall be employed in the performance and increase of the

The principle of the *Thetford School* case is, that where there are words that might have been interpreted as limiting the extent of the benevolent purpose had they stood alone, yet where they are coupled with other words which show such benevolent purpose to operate to the extent of the whole fund, the effect of the former words will not prevail (u).

In that case, the circumstance that the testator had given the whole of the value at the time of the gift, was considered

said works of piety and charity instituted and erected by the founder: for it appears, by his distribution of the profits, that he intended the whole should be employed in works of piety and charity, and that nothing should be converted to the private use of the executors or their heirs. And this resolution is grounded on evident and apparent reason: for, as if the lands had decreased in value, the preacher, schoolmaster, &c. and poor people should lose; so when the lands increase in value, *pari ratione* they shall gain. And they said, that this case concerned the colleges in the Universities of *Cambridge* and *Oxford*, and other colleges, &c.: for, in ancient time, when lands were of small yearly value, victuals then being cheap, and were given for the maintenance of poor scholars, &c., and that every scholar &c. should have 1*d.* or 1*d. ob.* a day, that then such small allowance was competent in respect of the price of victuals and the yearly value of the land; and now the price of the victuals being increased, and with them the annual value of the lands, it would be now injurious to allow a poor scholar 1*d.* or 1*d. ob.* a day, which cannot keep him, and to convert the residue to private uses, where in right the whole ought to be employed in the maintenance or increase (if it may be) of such works of piety and charity which the founder has expressed, and nothing to any private use: for every college is seised *jure collegii, scilicet*, to the intent that the members of the college, according to the intent of the founder, should take the benefit, and that nothing should be converted to private uses. *Panis egentium* (Duke, 72; Herne, 80; Co. Litt. 342; 4 Rep. 106 a) *vita pauperum, et qui defraudat eos homo sanguinis est.* And afterwards upon conference had with the other justices, they were of the same opinion, and according to their opinions the bill passed in both houses of parliament, and afterwards was confirmed by the king's royal assent. Note, reader, there is a good rule in the act of parliament called *Statutum Templariorum; Ita semper quod pia et celeberrima voluntas donatorum in omnibus teneatur et expleatur, et perpetuo sanctissime perseveret.*—*Thetford School* Case, 8 Rep. 130 b, 131 b; *S. C.* Poph. 6, 7; Moor, 594; Cro. Eliz. 288; Duke, 78—80.

(u) *Attorney General* v. *Painter —Stainers' Company*, 2 Cox, 55.

as evidence of his intention that the whole value of the land, at any future time, should be applied to the same purposes, upon two grounds; first, because no other trust was expressed in the instrument, and, secondly, because the whole value of the land had been given by the instrument itself, for the particular purposes therein mentioned (*w*).

But the doctrine established by that case has been said to have never been applied, except where the value of the lands, or what was represented to be the value at the time of the gift, had been distributed (*x*).

Lord *Brougham* said, " the *Thetford* case goes on this principle, that where nothing is said of surplus (for it is only in cases where nothing is said that the question can arise), it may be safely assumed that it is given to the charity out and out, and not to the trustees, if it is exhausted by the gift to that charity. Suppose, for instance, as in the *Thetford School* case, I give land to the amount of 20*l.* by the year, (stating the revenue,) to A. and B., in trust for the charity C.; if I give 15*l.* to one, 3*l.* to another, and 2*l.* to a third master or other party in the charity, and will and declare that those three sums of 15*l.* a-year, 3*l.* a-year, and 2*l.* a-year respectively, shall at all times be paid to such persons; as those all taken together amount to 20*l.*, I must be taken to give all that to the trustees A. and B. for the sole use of the charity. The rule of the *Thetford* case under such circumstances is this, that this exhaustion of the fund indicates the founder's intention that the whole shall be charity fund, and none should be beneficiary to the trustees. It disposes, therefore, of the whole, and raises no implied trust *quoad* the surplus in the trustees of the school; it disposes of all possible surplus, and leaves no question of this description ever in such a case to arise. But it is very different when, instead of giving 15*l.* 3*l.* and 2*l.*, I give 15*l.* and 3*l.*, and leave 2*l.* unappropriated. There the rule of the *Thetford* case does not apply at all; there you have given 18*l.* out of the 20*l.*; and the whole argu-

(*w*) See 2 Russ. 433.

(*x*) Per Lord *Eldon*, in *Attorney General* v. *Mayor of Bristol*, 2 Jac. & Walk. 332.

ment, and the principle, and the rule in that case consequently does not apply" (*y*).

A party, seised in fee, granted a lease of a farm for 96 years, reserving to himself the yearly rent of 7*l.* during his life, and after his decease 6*l.* 10*s.*, viz. 3*l.* 10*s.* to the master and fellows of *Christ's College* in *Cambridge*, for the maintenance of a poor scholar there; 40*s.* to the constable, minister, and churchwardens of one parish, and 20*s.* *per annum* to the overseers of another parish, for the relief of the poor. The lessor afterwards conveyed the inheritance of the farm to trustees upon trust, after the expiration of the lease, (which happened in 1649) to apply all the rents for the relief of a poor scholar in *Christ's College*, and the relief of the poor of the two parishes. The scholar and poor having only received 6*l.* 10*s.* *per annum* until 1670, upon an information at the relation of the college it was decreed, that the whole rents of the estate should be paid to the scholar and poor according to their several proportions of the 6*l.* 10*s.* *per annum* (*z*).

The circumstance of giving the *whole profits* of the fund, besides having distributed the whole value at the time of the gift, indicates an intention to give the increased value. Where a testator by will dated 15th January, 1612, devised the whole profits of the tithes in *Gwenther*, to be disposed of for ever, to the uses thereafter specified; and then gave to several charities and other public uses, several certain sums to be paid annually; which sums, taken altogether, made up the value of the tithes at the time of the gift. The tithes having since greatly increased, and producing annually more than sufficient to answer the particular sums mentioned in the will; a question arose, whether the surplus should be applied in augmentation of those uses, or should go to the heir-at-law. An attempt was made to distinguish this case from that of the *Thetford School*, inasmuch as there, the estate was vested in trustees; but here, the heir-

(*y*) *Attorney General* v. *Brasen Nose College*, 2 Clark & Finn. 328.

(*z*) *Attorney General* v. *Townsend and others*, Duke, 34, (590).

at-law was trustee, to whom it was said, the testator intended to give the surplus, but the court decided against the heir (*a*).

Though the testator has not pointed out what was the yearly value of the lands, yet if he has otherwise sufficiently manifested his intention to give the whole of the estate to charitable purposes, the increased rents must be applied to the charitable uses which he has mentioned. Thus in the following case, the court fastened upon a declaration in the testator's will, that he meant the whole to be given to charity; and said, where a general charitable purpose is expressed, the court or the crown will find out what charity shall take.

In *Arnold* v. *The Attorney General*, one of the strongest cases upon the subject, a testator, being seised in fee of a manor of the annual value of 240*l.*, did by his will, among other legacies, give to his heir-at-law 40*s.* to be paid out of his personal estate, and then proceeded in these words: "Being determined to *settle* for the future, after the death of me and my wife, the manor of F. with all the lands, woods, and appurtenances to *charitable uses*, I devise my manor of F. with the appurtenances unto *three trustees*, and their heirs and assigns for ever, upon trust, that they or their assigns, after the death of me and my wife, should pay and deliver yearly for ever," several particular sums to charitable uses therein mentioned, amounting in the whole to 120*l. per annum*, and made no further charge upon the said manor except the expenses of the trustees in the execution of the said trust. On a bill brought by the attorney general, after the death of the testator's wife, against his heir-at-law, to establish the charities, and to compel the trustees to transfer their trust estate, the heir-at-law by his answer claimed the surplus of the charity estate after satisfying the yearly payments expressed in the will and the charges of the trust. Upon a reference to the master to ascertain the yearly value of the manor, he reported it to be worth 240*l. per annum* at the time the testator made his will. The Court of Chan-

(*a*) *Attorney General* v. *Johnson*, Ambl. 190.

cery declared that all the profits of the premises ought to be applied to the charities mentioned in the will, and that the heir-at-law was not entitled to the surplus; and directed how the surplus should go in augmentation of the charities; but in case the heir-at-law should execute a release and conveyance of the premises to the trustees according to the decree, then the heir-at-law was to have his costs out of the sale of timber, and the trustees to be indemnified, which decree was affirmed by the House of Lords (*b*).

The court in that case relied on the introductory language, expressing a determination to settle all the lands to charitable uses, the legacy of 40*s.* out of the personal estate to the heir-at-law, and the fact that there was no disposition whatever of the yearly value of the land beyond the 120*l.* a-year, though it was of the value of 240*l.* a-year, amounted to such a denotation of intention of a *general purpose* of charity, that the court had authority upon the precedents with respect to charitable devises, to apply the whole of the 240*l.* to charitable purposes; and that it could itself select to what charitable purposes the surplus should be applied (*c*).

In the case of the *Attorney General* v. *The Mayor of Coventry* (*d*), the reversion in fee of divers lands let on leases, on which altogether the annual rent of 70*l.* was reserved, was granted by King Henry VIII. to the corporation of Coventry; 400*l.* of the purchase money was paid by the corporation, and 1000*l.* by Sir *Thomas White;* but in the grant, *the corporation was said to be the purchasers,* and *it was by the deed declared, that the whole* 70*l. per annum* should be applied to the several charities therein-mentioned. The leases having expired, the value of the lands was greatly increased, but the surplus had been all along received by the corporation of *Coventry,* the lands themselves not being given to the charities, but particular rents out of the lands. It was decreed, that the corporation should have the surplus

(*b*) *Arnold* v. *Attorney General,* Show. P. C. 22; 1 Eq. Abr. 98, pl. 3; *S. C.* 2. Vern. 397. Cited by Lord *Eldon,* 2 Jac. & Walk. 308; 2 Russ. 434.

(*c*) Lord *Eldon,* 2 Russ. 435.

(*d*) 2 Vern. 398. See *Judgment of Holt,* C. J. 3 Madd. 353—370.

of the profits. The lord keeper, and three judges who assisted him, being of opinion that this case was not within the reason of *Thetford School* case (*e*), but that there was a plain and substantial difference between them; for in that case the lands were given to the charity; and though in directing the application of it, a sum certain was given to maintain a schoolmaster, and sums uncertain to other charities, amounting to what was the value of the estate, it was reasonable that as the estate increased, the charity should do so too, because no one else was to take any benefit thereof; but that in the present case, not the lands themselves, but 70*l.* a-year issuing out of the lands, was allotted to charities, and the town of *Coventry* was expressly mentioned to be the purchasers; and it appeared that they raised 400*l.*, part of the consideration money, and that with some difficulty, by sale of their goods when they were in a decayed condition, and the information was dismissed (*f*).

But on appeal to the House of Lords, it was adjudged that the decree of dismission should be reversed; and that the Court of Chancery should proceed to give such relief upon the information as should be just; the House being of opinion, that the increase of the value of the lands in question ought to be applied in augmentation of the several charities (*g*).

In the *Attorney General* v. *The Skinners' Company* (*h*), Sir *Andrew Judd* having founded a free grammar-school in the town of *Tonbridge*, obtained in the seventh year of Edw. VI., 1553, letters patent for its formal establishment. Such

(*e*) *Ante*, pp. 545, 546.

(*f*) Lord *Eldon* in commenting on this case, (*Attorney General* v. *Mayor of Bristol*, 2 Jac. & Walk. 321—324,) after having examined a copy of the deed of gift, arrived at the conclusion that the purchase-money was supplied wholly by Sir *T. White*, and that the clear yearly value of the property was exactly the sum which was distributed in different proportions amongst the objects of the charity.

(*g*) *Mayor of Coventry* v. *Attorney General*, Lord's Journ. 17 vol. p. 198; Colles, P. C. 280—286; *S. C.* 7 Br. P. C. 235, 2d edit. See an account of this charity in the Appendix to Report on Municipal Corporations, pp. 1812—1819.

(*h*) 2 Russ. 407.

letters patent gave him the direction of the school, and the management of its possessions during his life, investing him for that purpose with a corporate character; and they ordained, that after his death, the master, wardens, and commonalty of the mystery of *Skinners* of *London*, for the time being, should be, and be called governors of the possessions, revenues, and goods of the free grammar-school of Sir *A. Judd;* that they should be a body corporate by that name; that they should have authority to appoint the master and under-master; that they should be capable of holding lands in mortmain of the yearly value of 40*l.*, for the support and maintenance of the school; and that all the issues, rents, and revenues, of all the lands, tenements, and possessions thereafter to be given towards the support of the school, should be converted to the support of the master and under-master of the school, and to the reparation of the said lands and tenements, and not to any other uses. Sir *A. Judd* was also declared capable of taking and holding lands, towards the support of the school, for his own life, with remainder to the *Skinners' Company.*

For the maintenance and support of the master and usher of the said school, the said Sir *A. Judd* purchased divers messuages and lands, then of the yearly value of 30*l.* or thereabouts, situate in the parishes of *All Saints, Gracechurch Street,* and *St. Pancras, Middlesex,* which lands were conveyed to the said Sir *A. Judd* and *Henry Fisher,* a trustee for Sir *A. Judd,* as joint tenants in fee. The said Sir *A. Judd,* during his life, received the rents and profits of the lands so purchased, amounting to the annual sum of 30*l.*, and applied the sum in the payment of 20*l.* annually to the master, and 8*l.* annually to the usher of the said school, and laid out in the repairs of the school-house, or reserved for the repairs thereof, the remaining sum of 2*l. per annum.* The said Sir *A. Judd,* in his lifetime, made and published certain rules and ordinances respecting the management of the said school, and the disposition of the revenues thereof, such revenues at that time amounting to the aforesaid sum of 30*l. per annum;* and the rule or ordi-

nance relating to the disposition of the revenues of the said charity was as follows: "I will that the master receive quarterly for the wages 5*l.* and the usher 40*s.*, to be delivered by the hands of the said *Skinners* or their deputy, and that they have their dwelling rent free; and all other charges, as in repairing of the said school, in all manner of reparations, borne and allowed, necessarily *and according to the view from time to time taken by the said Skinners.*"

Sir *A. Judd* by his will, dated the 2nd September, 1558, devised the lands and hereditaments which he had so purchased as aforesaid, and also certain other messuages, lands, tenements, and hereditaments whereof he was seised, unto the master and wardens of the *Skinners' Company* and their successors for ever, for the support of the aforesaid school and for other charitable purposes; and the surplus rents of such estates, after satisfying the charitable uses and the repairs of the estates devised, was given to the Company of *Skinners*, "to order and dispose of at their wills and pleasures" (i).

Sir *A. Judd* died soon after the date of his will, and after his death the said *H. Fisher* conveyed to the *Skinners' Company* the messuages and lands which had been so purchased as aforesaid. After the death of the said *H. Fisher*, his heir-at-law endeavoured to impeach such conveyance.

In the 14th Eliz. an act of parliament was passed, intituled "An act for the better and further assurance of certain lands and tenements to the maintenance of the grammar-school of *Tonbridge*, in the county of *Kent*," which, after reciting the foundation of the school and the grant of the letters patent, stated, that for the maintenance of a schoolmaster and usher, Sir *A. Judd* had purchased of *John Gates* and *Thomas Thorogood* certain lands and tenements, situate in the parish of *All Saints*, in *Gratious Street*, and in the parish of *St. Pancras*, of the yearly value of 30*l.*; that in the conveyance Sir *A. Judd*, at the time of the purchase being fully determined (as did very evidently and credibly appear) to have the premises conveyed to the *Skinners' Com-*

(i) See *post*, pp. 575—577.

pany, did of trust join with himself one *H. Fisher*, formerly his servant; that in the 4th Elizabeth, after the death of Sir *A. Judd*, *H. Fisher*, in performance of the trusts and confidence reposed in him, conveyed the said lands and tenements, with other lands of his own of the yearly value of 6*l.*, to the *Skinners' Company*, for the sustentation as well of the said free school as of one student in the University of *Oxford*; and that since his death the title of the *Skinners' Company* had been impeached on the ground of a previous conveyance made by *Fisher*, in fraud of his trust; and it then declared that previous conveyance to be void, and enacted, "that all lands, tenements, and hereditaments with the appurtenances secured or conveyed unto the aforesaid master, wardens, and commonalty of the *Skinners* in *London*, as is aforesaid, shall from henceforth ever continue, remain, and be unto the said master, wardens, and commonalty of the mystery of *Skinners* of *London*, *to the godly uses and intents above mentioned.*"

After such act, the heir-at-law of *H. Fisher* again endeavoured to impeach the title of the *Skinners' Company* to the lands conveyed.

In the 31st year of the reign of Queen Elizabeth, another act was passed, upon the application and petition of the company, intituled "An act for the better assurance of lands and tenements in the maintenance of the free grammar-school at *Tonbridge*, in the county of *Kent*;" which, after reciting that *A. Fisher*, the heir of *H. Fisher*, had endeavoured to impeach the aforesaid conveyance, letters-patent, and act of parliament, by pretence of the misnaming of the corporation, enacted "that all the letters-patent, deeds, writings, assurances, and conveyances before mentioned, and the said act of parliament, shall be, of and for all such houses, lands, tenements, and hereditaments as were in anywise conveyed, meant, or intended to or for the said free grammar-school, good and effectual in law, to the governors of the possessions, revenues, and goods of the free grammar-school of Sir *A. Judd*; and that the governors of the possessions, revenues, and goods of the said free gram-

mar-school, shall have, hold, and enjoy for ever, all such houses, lands, tenements, and hereditaments whatsoever, with the appurtenances, as were assigned and conveyed, or meant or mentioned or intended to be assigned or conveyed, unto them by any of the letters-patent, writings, conveyances, or act of parliament before mentioned, to or for the said free grammar-school."

The annual rents and profits of the estates conveyed and devised as aforesaid, having increased to several thousand pounds *per annum*, the *Skinners' Company* received the same, and paid 70*l. per annum* only to the master and usher of the school, and appropriated the remainder to their own use. The information prayed that it might be declared that the whole rents of the estates were applicable to the support of the school, subject to the donations in the will, and for a reference to the master to apportion the rents amongst the different parties interested under the will, and to settle a plan for the future application of all the rents and profits of the estates, belonging to the school at *Tonbridge*, to the uses of such school.

The question raised by the information was, whether the *Skinners' Company* were bound to apply the whole profits of the premises to the charities mentioned in the will, or were entitled, after making the pecuniary payments specified by Sir *A. Judd*, to retain the surplus rents for their own use.

This question, so far as regarded such of the devised lands as had *not* been purchased of *Gates* and *Thorogood*, depended entirely on the construction of the will of Sir *A. Judd;* but the relators insisted that whatever might be the construction of the will, it was clear from the acts of parliament and the instruments and transactions referred to in them, that the lands purchased from *Gates* and *Thorogood* were vested in the *Skinners' Company* on an express trust for the support and maintenance of the school. On the other hand, the *Skinners' Company* contended that their title to these lands, as well as the lands *not* purchased of *Gates* and *Thorogood*, must be considered as entirely derived from and depending on the will; and that though at the time when the will was

made a devise of lands to a corporation was void, the gift was subsequently rendered good as an appointment to a charity by the retrospective operation of the stat. 43 Eliz. c. 4 (*k*).

Sir *John Leach*, V. C. decided, that the lands purchased by Sir *A. Judd* of *Gates* and *Thorogood* were then vested in the *Skinners' Company*, not under the will of Sir *A. Judd*, but in consequence of the previous trust created in *Fisher*, and by force of the statutes of Elizabeth, and in their special corporate character as governors of the possessions, &c. of the free grammar-school of Sir *A. Judd* in *Tonbridge*, and were held by them according to the language of the letters patent of Edward VI. for the support of the master and under-master of the said school, and for the reparation of the said lands and tenements, and not for any other uses and intents (*l*).

On appeal against the decree of the vice-chancellor, Lord *Eldon* held that the two acts of parliament were to be considered as speaking not only the language of the legislature, but of the parties who obtained them, and as declarations by them that the estates in question were devoted to the uses and purposes therein described, and to no other purposes whatever: for the passing of the acts could not be accounted for unless upon the supposition that it was the complete conviction of all parties, that, whatever the operation of the will of Sir *A. Judd* might be with respect to the other estates, yet as to the estates purchased of *Gates* and *Thorogood*, there had been previous trusts created, which could not be affected by the will, although it purported to affect them; and therefore that such lands were given exclusively for the support of the master and under-master of the school, and for the reparation of the said lands and tenements; and that the increased rents of such lands were to be applied to the maintenance of the school on an enlarged scale (*m*).

(*k*) *Ante*, pp. 245, 246.

(*l*) *Attorney General* v. *The Skinners' Company*, 5 Madd. 173.

(*m*) The decree of the lord chancellor declared "that it is sufficiently established and proved in this cause that the messuages, lands, and tenements mentioned or comprised in the said statutes of the 14th and 31st of Queen Elizabeth in the information mentioned, which were purchased by Sir *A. Judd* of *Gates*

Where lands of the annual value of 150*l.* vested in a public company for charitable purposes, had greatly increased in value, the company were held to be trustees, although an annual sum of 9*s.* was, by the deed of gift, left unappropriated.

A., by a deed executed in 1616, for a nominal consideration, conveyed to certain persons therein named, certain premises, which were then let upon lease for forty-one years, at a rent of 150*l.* By another deed of the same date, reciting, among other purposes, a desire to relieve the poor of the mystery of *Mercers*, of which the grantor was free, and the better to manifest his love and affection towards his brethren the freemen of the said company, it was declared, that the grant of the premises comprised in the former deed, and of the rent of 150*l.* reserved upon the lease, was made upon trust as to the premises, and the rent reserved, and all future rents and profits; that the grantees should receive and pay the monies arising therefrom to the wardens of the mystery of *Mercers* of the city of *London*, and their successors, and that the said wardens and commonalty should dispose of the monies to the uses therein mentioned. The schedule annexed to the deed then enumerated various charitable objects to which the money was to be applied, among which was a donation to poor brethren of the *Mercers' Company*. These donations amounted altogether to 149*l.* 11*s.*, leaving a sum of 9*s.* of the reserved rent of 150*l.* unapplied in the

and *Thorogood*, were vested in the defendants, the *Skinners' Company*, in their special corporate characters of governors of the free grammar-school of Sir *A. Judd*, Knt., in the town of *Tonbridge*, in the county of *Kent*, not under the effect of the said instrument stated as the will of Sir *A. Judd*, but upon a trust previously and duly declared thereof by the said Sir *A. Judd*; by virtue and force of which trust the same messuages, lands, tenements, and hereditaments are to be considered as held by the said defendants, the *Skinners' Company*, in such corporate character, subject to such trust, and to and for the uses, intents, and purposes stated and expressed in the said letters-patent and statutes as aforesaid, and to and for no other uses, intents, and purposes."—*Attorney General* v. *Skinners' Company*, 2 Russ. 425; *S. C.* Jac. Rep. 679.

hands of the *Mercers' Company*. By improvements of and additions to the estate, in consequence of an act of inclosure, the rent increased to the sum of 1000*l.* a year, at which rent the premises were let in 1817; of this increased rent the *Mercers* applied 521*l.* 2*s.* in various payments, according to the trusts; the remainder of the rents of the estate they had for many years carried to the general account of the company, and applied them to their own use. Upon an information filed, to regulate the charity, it was held by the Court of Exchequer, and on appeal by the House of Lords, that the *Mercers' Company* were trustees of the rents and augmented rents, and that the surplus, after answering the payments directed by the deed, were applicable to such and the same purposes as directed by the deed, without prejudice to the question, how far the *Mercers' Company* were entitled to share in the increased rents, with reference to their share of the original rent of 150*l.* (*o*)

By a deed, granting lands, &c., to a corporation of the city of *London*, to be applied to charitable uses, which exhausted the then annual value, it was provided, that if the premises should be evicted the company should be discharged from any further payment, or continuance of the uses; and if the premises, by alteration of times, should so much decay in rent, that the uses could not be supported therewith, the company should only be chargeable with the payments appointed to *Christ's Hospital*, and to the Company of *Barber-surgeons*, being 6*l.* yearly; and from thenceforth it should be lawful for the said company to make such abatement of the sums before limited, except the 6*l.* to *Christ's Hospital* and the *Barber-surgeons*, as should be answerable to the fall of the rents which should happen. This clause was held not to make the company at all events chargeable for the payment of the 6*l.*, but if the *Mercers' Company* were entirely evicted from the property, they were to be relieved from all liability; and in case of a reduction of the

(*o*) *The Mystery of Mercers* v. *Attorney General*, 2 Bligh, N. S. 165. See *Attorney General* v. *Brazen Nose College*, 2 Clark & Finn. 295, *post*.

rents, then in the first instance, the 6*l.* was in all events to be paid to *Christ's Hospital* and the *Barber-surgeons*, and the surplus above 6*l.*, to be divided among the other objects of the charity rateably. The company were declared trustees of the augmented rents, without prejudice to the question, how far they were entitled to share in the augmented rents, with reference to their share in the original rent (*p*).

Where land is settled for the maintenance of a charity, with special directions as to the application of part of the rents, with a power to the founder of letting the lands at a rent amounting to the sum disposed of, after the expiration of such lease the surplus rent goes to the charity, and does not result to the heir. A. B., after obtaining letters-patent for incorporating the *Haberdashers' Company* as governors of the free grammar-school of *Newport*, with power to purchase lands for the charity, not exceeding 300*l. per annum*, by indenture conveyed to that corporation an estate of about 200*l.* a-year, for the maintenance of the school, "and other pious and charitable purposes." By another indenture of the same date, the manner in which the school was to be maintained was specified, and some other charities mentioned, and a fund appropriated to each. The whole sum required for these purposes was 175*l. per annum*, which the trustees were directed to apply out of the rents and profits. Power was given to A. B. the founder (*inter alia*), to make leases, reserving 175*l.* rent, or *more*, and to fell timber, and dispose of the same by will. A. B., in consideration of love and affection, leased the estate to his nephew for twenty-one years, at the yearly rent of 175*l.* He then, by his will, directed the lease to be renewed to the same lessee, for a reasonable term, at the same rent; and after reciting his power as to the wood, directed that the corporation might sell as much as would amount to 400*l.* or 500*l.* and lay out the produce in land, to be settled on them, for the better securing the sums appointed by him for the charity; care being taken to leave sufficient for repairs, &c. There being a large surplus in

(*p*) *The Mystery of Mercers* v. *Attorney General*, 2 Bligh, N. S. 184.

1784, after payment of the 175*l.* *per annum*, the heir of the founder claimed it as a resulting trust, insisting that the charity was only entitled to receive out of the rents and profits, the sums specified. Consistent with this, it was said, were the words as to the estate to be purchased, that it should go, not for the establishment of the charity, but for securing the payments directed. There was nothing to show that the estate was to go to the charity. But the lords commissioners considered the whole as disposed to the charity by the first deed; and that the latter only specified certain purposes, leaving the rest as before. By this deed, the founder was at liberty to dispose of the rents and profits during his life, paying thereout 175*l.* *per annum* to the charity, and also to make a beneficial lease to some friend or relation, reserving the same sum, or as much more as he pleased. In fact, he did make a lease to this relation, reserving the sum specified, and was desirous that it should continue as long as that relation and his family should be existing to have the benefit of it; and during that time the charity could receive no improvement, because there was no fund beyond that. When that object was at an end, then the trust ceased, as far as respected the confinement of them to that sum; and then the remainder of the deed would be to be executed. Therefore there was no intention in favour of the immediate heir, much less in favour of a remote heir; and it was not argued upon the ground of such intention, but upon the idea of an omission, and a necessity for the court to give all beyond the sum specified to the heir, because there is no other person to take it. But in the first deed there are other objects, *viz.* the general purpose of supporting this charitable school. The surplus does, by the constant rule of this court, result to the charity, who take the benefit, by enlargement of the original trust, or in some other way, under the authority of the court. That being so, the necessity of this claim for the heir-at-law fails; for it is easy to dispose of this for the benefit of the charity, and the best way seems to be, by enlarging the payments. The whole estate, therefore, is the

fund which is granted, and the fund directed to be applied, with this difference only, that the founder, and those to whom he granted the fund, have agreed, that the whole for a certain time should be limited in point of produce. It is still the whole estate which is given to them, but arranged so as only to produce a precise sum while that lease continued, but that does not preclude the charity from having the benefit of it when the leases are expired and the fund is increased. There is no necessity for giving it to the heir, and we should violate the intent and disappoint the charity by decreeing in his favour. Therefore, it must be declared, that there is no trust for the heir; and the trustees claiming nothing, must account for the rents and profits, with just allowances, and the master must prepare a plan for the application of the surplus, having regard to the directions of the founder (*q*).

A man, out of favour and kindness towards the son of A., demised certain premises, including the advowson of a vicarage to A. & B., for a term of 99 years, at a rent of 40*l.* a year; shortly afterwards, on the 21st of December, 1668, he conveyed the same premises to trustees, upon trust, to pay out of the profits thereof, 20*l.* a-year to his sister, during her life, and after her death, to her children; and after the death of the survivor of the children, to pay the said 20*l.* a-year to the dean and sub-dean of the collegiate church of St. Peter at *Westminster*, and the two senior prebends of the said church, and their successors for ever, in trust for four of the most worthy scholars of the free school at *Westminster*, that want means to subsist at the university; and upon further trust, out of the residue of the rents and profits of the premises, over and above the said sum of 20*l.* to pay the yearly sum of 15*l.* to poor children of the parish of *Hayes* in *Middlesex*, and the yearly sum of 5*l.* for the benefit of the poor children of another parish. The above three sums included the whole value of the property in 1668. In the year 1696, the surviving trustee of the estate granted a

(*q*) *Attorney General* v. *Tonna*, 2 Ves. jun. 1; *S. C.* 4 Br. C. C. 103.

reversionary lease for 500 years, and the parties in possession had paid only 40*l.* a year to the trustees of the charity. On an information to set aside the lease as improvident, and a breach of trust, and that the whole of the rents, which had increased considerably, might be applied according to the trusts of the deed of 1668, the court held that the charities were entitled to the whole rents, and decreed the lease of 500 years to be void (*s*).

2. *Usage admitted in construing charitable gifts.*] In the construction of written instruments, words are to be understood according to their common and general acceptation at the time when the instrument was made (*t*), and with reference to the nature of the subject. If the language in ancient charters has become obscure from its antiquity, or the construction is doubtful, the constant and immemorial usage under the instrument may be resorted to for the purpose of explanation (*u*), though it can never be admitted to control or contradict the express provisions of the instrument.

Such continued usage is a strong practical exposition of the meaning of the parties. And modern usage, of forty or fifty years' duration, is evidence not only for that period, but evidence from which it may be presumed, if nothing is shown to the contrary, that the same course was pursued in earlier times (*v*). Even in the case of an act of parliament universal usage has been referred to as a proper expositor, where the language is doubtful (*w*).

The uniform course of modern authorities establishes the rule, that usage is the best expositor of large and general

(*s*) *Attorney General* v. *Ward*, 7 Law Journ. Chanc. 114.

(*t*) Vaugh. Rep. 169; Com. Dig. Parols (A).

(*u*) *Rex* v. *Varlo*, Cowp. 248; *Gape* v. *Handley*, 3 T. R. 288 n.; *Rex* v. *Bellringer*, 4 T. R. 810; *Rex* v. *Osbourne*, 4 East, 333; *Bailiffs, &c. of Tewkesbury* v. *Bricknell*, 2 Taunt. 120; *Rex* v. *Mayor of St. Albans*, 12 East, 559; *Rex* v. *Mayor of Stratford-upon-Avon*, 14 East, 348; *Rex* v. *Mayor, &c. of Chester*, 1 Maule & Selw. 101; *Mayor of London* v. *Long*, 1 Campb. 22; *Chad* v. *Tilsed*, 2 Brod. & B. 405.

(*v*) By *Richardson*, J. 2 Brod. & B. 409.

(*w*) *Sheppard* v. *Gosnald*, Vaugh. 169. And see *Rex* v. *Scott*, 3 T. R. 604; 2 Inst. 282.

words in ancient grants and deeds; although, if usage be resorted to for the purpose of cutting down the sense which the words will bear, and giving them a restricted qualification, clear evidence ought to be produced, that the instrument, admitting a larger sense, has been practically acted on in a more limited one.

On an information to set aside an election to a perpetual curacy, it appeared that the impropriate rectory, out of which the curacy arose, had been granted in trust for the use of the parishioners and inhabitants of a parish for ever: on the part of the relators, it was contended, that the right of nomination to the curacy ought to be confined to persons paying scot and lot, or to persons paying to church and poor; and on the part of the defendants, that it extended to all housekeepers in general. Lord *Hardwicke* said, "that some sort of limitation was allowed by both sides to have been put by usage on the liberality of the grant; and that in the construction of ancient grants and deeds, there is no better way of construing them than by usage; and *contemporanea expositio* is the best way to go by;" and since there was evidence in that case of housekeepers having constantly voted, it was held that such usage ought to prevail (*x*).

The general words of ancient deeds may be construed by evidence of the manner in which the thing has been always enjoyed (*y*).

Although the statute of limitations (*z*) does not apply in the case of charities, length of time is a very material consideration upon a question as to the true construction of an instrument; but if the enjoyment which has obtained for more than two centuries has been a breach of trust, the court will not scruple to disturb it, although regard must be had to the circumstance of long enjoyment (*a*).

(*x*) *Attorney General* v. *Parker*, 3 Atk. 576; *S. C.* 1 Ves. sen. 43; *Attorney General* v. *Forster*, 10 Ves. 335.

(*y*) 2 Brod. & B. 409; *Weld* v. *Hornby*, 7 East, 199; *Rex* v. *Osbourne*, 4 East, 327.

(*z*) See stat. 3 & 4 Will. IV. c. 27.

(*a*) *Attorney General* v. *Mayor of Bristol*, 2 Jac. & Walk. 321.

Lord *Holt* said (*b*), "I do agree there is no statute of limitation shall bar a charity; but in a thing that is obscure and dark, and there hath been an enjoyment for a long time without interruption, it is a great evidence of a right: for quiet enjoyment for a long time does presume a rightful enjoyment."

Lord *Eldon* said (*c*), "Unless I am mistaken, there are many cases to be found in both the universities, where land has been given of a greater value than the amount of the charges (which have been for scholars, exhibitioners, and so on) upon that land, and where, in point of fact, the enjoyment has been thus—the charges have been made good from time to time, and the surplus has been taken by the college itself; and I believe, if this were considered an improper application of their funds, it would have the effect of disturbing the distribution of many of the colleges in both universities."

Immemorial usage is admitted for the purpose of explaining and construing a private deed. Thus, where a question arose on the construction of an ancient deed, granting to the minister and churchwardens of a parish the power of appointing a schoolmaster, whether all the churchwardens must concur, or whether the act of the majority was sufficient; and the jury found the usage to be in favour of the appointment by a majority.

Lord *Kenyon* thought usage important in construing a deed. "It is insisted, however, that we ought to reject usage in this case, not only because the instances given in evidence were not as ancient as the deed, but because also no usage can be let in to explain a private deed. If the first reason were sufficient to reject the usage, I do not know how far such an objection might extend. In many cases a party undertakes to prove a custom from the time of legal memory,

(*b*) *Attorney General* v. *Mayor of Coventry*, 3 Madd. 368.

(*c*) *Attorney General* v. *Mayor of Bristol*, 2 Jac. & Walk. 317. See 5 Sim. 615, 616; *post*, p. 574.

the reign of Richard II. (*d*); but that proof is generally established by evidence of acts done at a much later period, and frequently no evidence is given beyond the present century; and of course the same strength of evidence is sufficient in this case, where the jury found it as a fact that the usage was in favour of the plaintiff. Neither is there any difference in this respect between a *private deed and the king's charter—in both cases evidence of usage may be given to expound them.* If there were any difference, it would rather operate against the defendant, for the king's grants are not construed strongly against the grantor as private deeds are, and yet usage is admitted in that case" (*e*).

Lord *Brougham*, in construing an old endowment, said "It is impossible, in cases of this description, to lay out of view the length of time during which a certain arrangement has subsisted, and a certain meaning been given in practice to the instrument of foundation. If, indeed, the practice, though of centuries, has been a breach of trust, doubtless the lapse of time shall be no bar; but long adverse enjoyment is not to be thrown out of view in seeking for the true construction of the provisions under which both conflicting parties claim; and a principle of distribution, under a known instrument of foundation, if long acquiesced in by all the objects of the bounty from whence the funds proceed, and to effectuate the purposes of which the instrument is framed, ought not without manifest reason to be disturbed. The rule of interpretation, from contemporaneous usage and long acquiescence, extends over every branch of law, independently of its connexion with matter of limitation and bar. I speak not now of a course of dealing with charitable funds, in the absence of evidence respecting the original endowment, or in plain opposition to its provisions; but where the endowment is forthcoming, its construction may be aided by adverting to the long and uninterrupted acting under it, and acquiescence in that acting. It may be added, that in all cases of contest between the different objects of the founder's

(*d*) See stat. 2 & 3 Will. IV. c. 71, for shortening the time in such cases.

(*e*) *Withnell* v. *Gartham*, 6 T. R. 397, 398; *S. C.* 1 Esp. N. P. C. 321.

bounty, the proof seems reasonably and naturally to rest on the party setting up a fixed portion as alone due to his companions in the charity, and claiming the surplus for himself. Exclusion may not be presumed even from usage; but the usage may be a confirmation of the evidence which the instrument offers, that the exclusion was intended" (*f*).

Long usage will have great weight in the construction of instruments as to the real nature of the charity intended, as that a school was to be confined exclusively to the teaching of the learned languages (*g*).

Lord *Eldon* was of opinion where it was clear there had never been an application of the rents and profits, or any part of the revenues of a school, to any other purpose than to that of a free grammar-school, that such usage was quite sufficient ground to conclude that there had been a legal devotion of the whole to the purposes of a free grammar-school; but if it could from that usage have been inferred that what had been given to the school generally was properly applied to a free grammar-school, his lordship said that he should, if there had been a free grammar-school with an usage to teach more than the elements of the learned languages, give a construction to the words, borrowed from the usage as explanatory of them (*h*); but where a school, upon the true construction of the instruments establishing it, ought to be a grammar-school for instruction in the classics, the trustees will not be permitted to convert it into a school for teaching merely English, writing, and arithmetic, though it had ceased, from before the time of living memory, to be a place for classical education; and though it appeared from old regulations, made without authority, that elementary instruction in English had always been one of the objects of the institution (*i*).

(*f*) *Attorney General* v. *Smithies*, 1 Coop. Rep. of Lord *Brougham's* Judgments, 17, 18; *post*, p. 585. See *Attorney General* v. *Skinners' Company*, 5 Sim. 596; *post*, p. 582.

(*g*) *Attorney General* v. *Whiteley*, 11 Ves. 250, 251.

(*h*) *Attorney General* v. *Hartley*, 2 Jac. & Walk. 379.

(*i*) *Attorney General* v. *Earl of Mansfield*, 2 Russ. 501.

Where an institution exists for the purpose of religious worship, and it cannot be discovered from the deed declaring the trust what form or species of religious worship was intended, the court can find no other means of deciding the question than through the medium of an inquiry into what has been the usage of the congregation in respect to it; and if the usage turns out upon inquiry to be such as can be supported, it is the duty of the court to administer the trust in such a manner as best to establish the usage, considering it as matter of implied contract between the members of that congregation (*i*).

The mode adopted by the donor of the fund, who was the first trustee under the grant by which a provision was made for a school, in the distribution of the fund, after an acquiescence of two hundred and fifty years, without any other application, is very strong evidence of intention, and may be so treated by the court in construing the grant itself (*k*).

3. *Where the donee of the fund is entitled to the surplus rents, subject to fixed payments.*] Where an annual sum only is appropriated to special objects, and there is a residue which the trustees hold, that is evidence of the intention of the donor that the surplus should belong to the persons to whom the property is, in the first instance, conveyed; but it is only evidence of the intention, liable to be repelled by any other evidence arising out of the instrument upon which that fact appears.

In the *Attorney General* v. *The Mayor of Bristol* (*l*), it appeared that Sir *Thomas White*, being desirous of benefiting the inhabitants of certain towns and corporations, about the year 1566, paid to the mayor and corporation of the city of *Bristol* 2000*l.*, upon trust, to purchase lands of the *then clear yearly value* of 120*l.* and upwards, to be settled as mentioned in another deed. Such deed having been executed in

(*i*) *Attorney General* v. *Pearson*, 3 Mer. 400.

(*k*) *Attorney General* v. *Brazen Nose College*, 2 Clark & Finn. 295. See *post*, pp. 588—593.

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(*i*) *Attorney General* v. *Pearson*, 3 Mer. 400.

(*k*) *Attorney General* v. *Brazen Nose College*, 2 Clark & Finn. 295. See *post*, pp. 588—593.

(*l*) 2 Jac. & Walk. 294.

the year 1566, the manner in which the corporation dealt with the property was, by paying and advancing the several sums mentioned in that deed, in the manner prescribed by it; the property having increased very considerably in value, it was contended that the increased value ought to be applied for the benefit of the various corporations; and that the surplus above the particular sums specified and directed to be paid to each corporation ought not to be retained by the corporation of *Bristol*; but that those respective sums should be increased in certain proportions, formed upon the ratio which the sums specified bore to what was the value of the land at the time; and that all those corporations, to the number of twenty-three, besides the corporation of *Bristol*, ought to partake in the surplus beyond the sum of 104*l.*, which was the sum directed to be paid to each corporation in rotation (*m*).

(*m*) Sir *Thomas White*, in the year 1566, paid to the mayor, burgesses, and commonalty of *Bristol* 2000*l.*, upon trust, that they should therewith purchase to themselves, and their successors, messuages, lands, and other hereditaments, of the then clear yearly value of 120*l.* and upwards, above all yearly charges; and that they should settle and hold the said estates, when so purchased, in trust, for the equal accommodation and advancement of all such twenty-four cities, towns, corporations, and companies, as were mentioned in the deed of trust, and the same was to be a perpetual charity and benevolence of the said Sir *T. White* for ever. The corporation, shortly after the receipt of the 2000*l.*, invested part of it in the purchase of lands in *Bristol* and elsewhere, and, by letters patent, dated 9th July, 35 Henry VIII., such lands therein stated to be *then* of the yearly value of 76*l.*, were given and granted to the corporation of *Bristol* and their successors.

By indenture, dated the 1st July, 1566, made and executed by and between the corporation of *Bristol*, of the first part, and the president and scholars of *St. John's College, Oxford*, founded by Sir *T. White*, of the second part, and the master and wardens of *Merchant Taylors' Company, London*, of the third part, (which deed was executed by Sir *T. White*, although he was not a party; 2 Jac. & Walk. 324); after reciting that the corporation of *Bristol* had received 2000*l.* of Sir *T. White*, of his benevolence and gift, as well for the benefit of the city of *Bristol*, as also for the advancement and commodity of other cities and towns thereinafter specified, and to be employed for the purposes thereinafter declared, and *which said sum of* 2000*l.* the said *corporation did acknowledge themselves satisfied, contented, and paid;*

Sir *J. Leach*, V. C., said the case differed from the *Thetford School* case(*n*) and the *Coventry* case in this, that the

which said sum was delivered to the said mayor, &c., to the intent that they should therewith purchase lands, &c., of the yearly value of 60*l.* and more; and after reciting the aforesaid purchase and letters patent, it was covenanted and agreed between the parties and the mayor, &c., for themselves and their successors, did covenant with the said president and scholars, and their successors, and with the master and wardens of *Merchant Taylors*, and their successors, that the said mayor, &c., within four years, would purchase lands, &c., of the clear yearly value of 60*l.*, which lands, as well as those conveyed by the letters patent, and the rents thereof, were to be employed and bestowed for the purposes thereinafter specified, *and to no other uses, intents, or purposes.*

The mayor, &c., of *Bristol* covenanted, in 1567, and yearly thereafter, during eight years, to pay, at *Bristol*, 100*l.* for charitable purposes, for the benefit of inhabitants of that city.

Then a covenant by the corporation, in the year 1575, to pay 200*l.* for buying corn, to be sold again to the poor of *Bristol*.

Then a covenant by the mayor, &c., out of the rents of the lands purchased and to be purchased after the end of ten years, to pay the annual sum of 104*l.* for the benefit of the inhabitants of the several cities therein mentioned in rotation, until the year 1599.

The mayor, &c., of *Bristol* then covenanted to apply, in the year 1600, and during the term of ten years, 100*l.* per annum for the benefit of certain inhabitants of *Bristol*, and afterwards to apply 104*l.* for the benefit of the other cities mentioned in the order before prescribed. The deed contained a covenant, that if the mayor, &c., of *Bristol* should not apply the 104*l.* for the benefit of the other cities, the corporation should forfeit certain sums therein mentioned to the said president and scholars. The deed contained a proviso, that if the rents of the lands should be insufficient for the performance of the trusts, that during such time the payments directed to be made should cease; but the deficiency was to be made up as soon as the profits of the lands would allow.

The sums of money to be received by the president and scholars, as forfeitures from *Bristol* corporation, were to be applied for the other cities as the sum originally given to them.

It was directed, that within twenty years after the date of the deed, two persons, one nominated by the corporation of *Bristol*, and the other by the president and scholars, should, at the costs and charges of the corporation, visit all the cities and towns which were the objects of the charity, to ascertain whether the money had been applied according to the trusts of the deed.

And at the end of every twenty-four years afterwards, two persons, nominated as aforesaid, were to make like visits and inquiries.

(*n*) *Ante*, pp. 545, 546.

whole actual rents and profits were there, in the first place, applied; but here the covenant was to apply only, first 100*l.*, and afterwards 104*l.*, being less than the whole actual rent of 120*l.* This deed, however, begins with a declaration, that the whole rents, issues, and profits of the lands purchased, and to be purchased, should be applied to the uses thereinafter specified, and to no other uses and purposes. Upon the whole, the question here is, whether the surplus rent, not expressly appropriated, was left in the hands of the corporation of *Bristol*, as bounty to them, or as a mean of meeting the expenses incident to the management of the property, which consisted partly of houses.

Looking at the deed, not strictly as a deed of covenant, but as a deed of declaration by the corporation to the founder, and attending to all the provisions of the deed, and finding in it a *general purpose* to apply all the profits of the land in the charities mentioned, and that the particular sums appropriated were considered to exhaust all the profits, and as to the small surplus rent, not expressly appropriated, no intimation of bounty to the trustees, the vice chancellor was of opinion, that the corporation of *Bristol* must account for the whole rents, after deducting all expenses of management (*o*).

Upon appeal, Lord *Eldon* thought, taking the whole deed together, and seeing that it was a case in which the value of the land at the time of the gift was more than was distributed, and in which the increase and decrease in the value was regulated by a special provision, and considering that *Bristol* was a material and prominent object of the bounty of the author of the gift, that it was a gift to the corporation of *Bristol* subject only to the charges imposed. And it was declared that according to the true construction of the deed, the plaintiffs and the other corporations and towns therein named, were not entitled to the increased rents of the trust estates or any part thereof, or to any interest in the rents above the specific sums, which by the indenture the corporation of *Bristol* covenanted to pay to such corpora-

(*o*) *Attorney General* v. *Corporation of Bristol*, 3 Madd. 319.

tions and towns respectively, and the order of the vice chancellor was reversed (*p*).

The circumstance that the surplus rents of the estates given for charitable purposes have increased to a much larger sum than was expected by the donor, who directed that the rents of the estates should not be raised, will not give the heir-at-law any right to the surplus, nor deprive the donee of the fund of the benefit of the increased value, where it appears that such surplus as remained at the time of the gift, after answering certain specific purposes, was intended for such donee.

A testatrix by her will dated Nov. 1743, gave all her estates, both real and personal, to trustees upon trust, after certain other purposes as follows:—"And my will is, that when the annuitants hereinafter mentioned are dead, and all other things appointed my executors to do are performed, and also a site of ground purchased or procured for erecting a building for the reception of six fellows and ten scholars in the college or hall of *St. Catherine, Cambridge*, that then my trustees do well and truly convey all the real estates above mentioned, and all the personal estate to the master and fellows of the said college or hall for ever, for erecting the buildings aforesaid, and for the maintenance of six fellows and ten scholars in the said college or hall, and for other uses, in such manner and under such directions as are contained in a writing hereunto annexed under my hand and seal, intituled 'rules and orders, touching the benefaction of *Mrs. Mary Ramsden* to *Catherine Hall*, in *Cambridge*,' which writing I make part of my will. And I order that the buildings on my estate be kept in good repair, that the rents continue the same as at the time of my decease, and that leases be not made for a longer term than eleven years" (*q*).

(*p*) *Attorney General* v. *Mayor of Bristol*, 2 Jac. & Walk. 294—333; Reg. lib. A. 1820, fol. 449. See an account of this charity in 8 Rep. of Commissioners of Charities, 13 July, 1822, pp. 585—590, 596; and a rental of the lands, Ibid. 785.

(*q*) The paper referred to by the will, contained several rules for the

The estates had been conveyed to the master and fellows of *Catherine Hall*, according to the intent of the will, and

government of the foundation; the 1st and 2nd related to the buildings to be erected for the reception of the new fellows and scholars. The 3rd directed, that when the building should be completed and the whole expense of it cleared, the annual rents and profits should stand for ever appropriated for the uses thereinafter mentioned, and principally for the founding and maintaining six fellowships and ten scholarships in the college, to be called the *Skirne* fellowships and scholarships. The next rules related to the qualifications and elections of the fellows. By the 12th rule, the testatrix appointed, that for the maintenance of the fellows, they should have clear 52*l.* a-year, besides their lodgings rent free. The fellows of this foundation were in all things not therein specially directed otherwise, to be subject to the rules, statutes, and discipline of the college—to perform all college and university exercises, and to stand to all commons in the hall, and all other college dues, as the then fellows did. By the 13th rule, the fellows were to reside in the college six months in the year; or if they resided for a less time, they were to forfeit 16*s.* 8*d.* a week, "to be applied as hereinafter directed to the common stock of the college." By the 14th rule, the profits during the vacancy of a fellowship were to be "laid aside as above mentioned for the common stock of the college, to be applied as hereafter directed."

By the 17th rule, in all elections of scholars after the first (in which the master and fellows of *Catherine Hall* only were to be the electors), the fellows of this foundation were to be joined with them, and to have equal votes. By the 19th, the stipends of the scholars were to be 15*l.* a-year, besides their chambers rent free; they were to be subject in all things to the master and fellows, and to the discipline of the college, in the same manner as the then scholars. By the 22nd rule, they were also in case of nonresidence, to forfeit 5*s.* a week, which was to go to the common stock. The 27th rule was as follows: "The rents of the estates given in support of this benefaction, I think now stand at a reasonable rate, at which I hope they may be always kept; and as I desire the tenants may always have good and beneficial bargains, I would have no attempts, if possible, made to raise them. As they now stand, I hope after all deductions on account of taxes and repairs, and charges of management, the payment of the fellows and scholars and the other small payments charged in the last article, there will be a surplusage remain from the rents and profits of the estates for the benefit of the college; which, together with the forfeitures that shall accrue from the absence and vacancies of the fellowships and scholarships, I would have thrown into the common stock of the college, and improved if it may be, as a fund for the repairs of the college in general, as well the old as the

the rules thereto annexed. The gross annual rents of the estates, which at the death of the testatrix amounted to 674*l.* had since increased to nearly 2000*l.* The surplus rents, after payment of the stipends to the fellows and scholars of the testatrix's foundation, and the other charges made by her, were thrown into the common stock of the college, which was under the exclusive control of the master and fellows of the old foundation. The stipends of the *Skirne* fellows and scholars had been increased by several college orders. The object of the suit was that the fellows and scholars of the new foundation might be declared to be its primary objects, that their stipends might be increased, and that a scheme might be approved of for the disposition of the surplus rents and accumulations.

Lord *Eldon* said, that the question in the cause, which was very important with regard to other collegiate institutions, must be decided on general principles. His lordship said, that he did not know much about the colleges at *Cambridge*, but he knew that at *Oxford* "there are some colleges, in which accessions have been made to the old foundations, of such a nature, that the new fellows are made part of the original body, and are entitled to the same allowances, the same rights of electing, and to all the other privileges of the old foundation. There are other colleges which are formed of old and new foundations, having diffe-

new buildings, or the discharge of any debt that may now lie on the old college on account of the buildings already erected, or the making any additional buildings, or buying of books for the library, or other public uses within the college; but first, after all the necessary outgoings for taxes, repairs, and management, I would have the fellows and scholars paid before any other disbursements whatsoever. And if the rents of the estates prove at any time not sufficient to pay the same, I would have the forfeitures for absences and vacancies brought in aid, and pay the whole which is appointed to be distributed before any thing be laid aside for the common stock of the college." By another rule, the master and fellows of the college were explained to mean those of the old foundation.

rent estates, in which the fellows of the new foundations are not entitled to the privileges of the old, but in which the founder has left the rents and profits of his estates to be equally divided among them both; or where, from usage, or from what may be evidence of the terms on which the new foundations were accepted, the rents and profits are equally divided. There are, likewise, other colleges at *Oxford*, to which estates have been given to pay sums of money to support fellows who are maintained in this way out of the estates, and the surplus has been enjoyed according to usage, for a long course of years, which may be taken as evidence of the terms on which they were accepted. There are cases in which such distribution has existed for centuries; and I am sure you could not introduce a new rule into the universities, with respect to the application of their funds, without causing considerable confusion and distress; and such consequences make it the imperative duty of the court, before it does so, to be quite sure that the usage is contrary to the intention of the founders, and that that intention requires the usage to be interrupted. The court ought to be sure that such was the intention of the testatrix, before it lays down any rule respecting the application of the fund in this case; but if the court sees clearly that it was her intention that the surplus arising out of the rents and profits of her estate, after all the uses which she had specified, had been executed, should be divided equally among the fellows and scholars of both the old and new foundation, or should be applied exclusively for the benefit of her own foundation; I say, if the court is perfectly sure that such was her intention, it is bound to order such application."

Lord *Eldon* thought, that the words "common stock," meant the common stock of the college at the time the will was made; that the words in the 27th rule "for the benefit of the college," meant the old foundation; and decided upon the general effect of the whole will, that the old college was entitled to the surplus rents and profits not required for the

particular purposes specified in the will, and that such surplus was not to be distributed between the two colleges in equal proportions, but was a gift for the benefit of the old college (*r*).

Where lands were given to a company, directing them to make certain specified payments to particular objects of charity, and the residue of the rents was to be employed upon the needful reparations of messuages before mentioned, and the overplus was to go to the use of such company, to order and dispose of at their wills and pleasures; it was held that the company were entitled to the surplus rents for their own benefit, subject to the specified objects.

In 1558, Sir *A. Judd* made his will, which, among other dispositions, contained a devise of certain lands to his wife for her life, remainder, as to some of them, to his eldest son and heir in tail male, and as to others of them, to his second son in tail male. Then, after reciting that he had left various lands and tenements, particularly described, to descend to his son and heir, and that he had erected a free grammar-school at *Tonbridge*, in the county of *Kent*, to have continuance for ever, the testator gave and bequeathed to the master and wardens of the fraternity of *Corpus Christi* of the craft or mystery of Skinners, of the city of *London*, several houses and other property therein mentioned, which were therein stated to be altogether then of the annual value

(*r*) *Attorney General* v. *The Master of Catherine Hall, Cambridge*, Jac. Rep. 381—401. The decree declared that the surplusage of the rents and profits of the testatrix's estate remaining after the several deductions and payments in the 27th rule, mentioned or referred to, (*ante*, pp. 572, 573,) and which surplusage, together with the forfeitures in the same rule mentioned, are thereby directed to be thrown into the common stock of the college, was, according to the true construction of the said will and rules, intended to be given to the master and fellows of *Catherine Hall*, of the old foundation of the said college or hall; and that as to so much of such surplusage as was not necessary to be applied or improved as a fund for the purposes in the said 27th rule mentioned, the same belonged to the masters and fellows of the old foundation.

of 50*l.* 12*s.* 4*d.*, to hold the same unto the said master and wardens, and to their successors for ever. And the testator gave to the said master and wardens one annuity of 10*l.*, to be yearly issuing out of his messuage called the *Bell*, payable quarterly. The testator then proceeded: "I will that the rents, issues, revenues, and profits yearly arising, renewing, and coming of the messuages, lands, tenements, and other the premises given to the master and wardens, and their successors, as before expressed, shall be by them and their successors employed and bestowed in manner following (that is to say), 1st, I will that the said master and wardens, for the time being, shall yearly content and pay to the schoolmaster of my said free grammar-school at *Tonbridge* aforesaid, for the time being, for his stipend and wages, 20*l.* quarterly, on the four usual feast days; *Item*, to the usher of the school, 8*l.*, at the said four terms, by even portions; *Item*, I will that the said master and wardens for the time being shall, once in the year for evermore, ride to visit the said school, and there to see and consider whether the schoolmaster and usher of the said school do their duties towards the scholars of the said school in teaching them virtue and learning, and whether the scholars of the said school do, of their parts, use themselves virtuous and studious, and whether they do observe and keep the orders and rules of my said free-school or not; and I will that the said master and wardens, in their said visitation shall take order, if any of the rules or orders in my said school shall fortune to be broken, either by the master and usher, or by any of the scholars of the same, that then the same may be forthwith reformed and amended according to their good discretions, and as my special trust and confidence is in them; *and I will that the said master and wardens, for the time being, shall yearly have for their labours and pains* 10*l. yearly*; and also I will that the said master and wardens, for the time being, shall, for ever, weekly pay unto the six poor almsmen, inhabiting in my almshouses, within the close of *St. Ellen's* aforesaid, for their relief, 4*s.* (that is to say), to every of them 8*d.* weekly; and I

will the same to be paid every *Sunday* in the year by the hands of the renter-warden of the said company of *Skinners* for the time being; and I will that the said renter-warden for his pains, to be taken in and about the payment thereof, shall have yearly out of the rents and profits of the premises, 10*s*. And I further will that the renter-warden of the said company of *Skinners* shall bestow yearly, of the revenues and profits of the premises, 25*s*. 4*d*. upon coals, which coals so bought, I will, shall be yearly distributed and divided by the said renter-warden, to and amongst the said six almsmen, for their further relief and comfort; and I will the residue of all the rents, issues, and profits, yearly coming and growing of the said messuages, tenements, lands, gardens, and other premises, bequeathed to the said master and wardens, shall be employed by the said master and wardens, for the time being, upon needful reparations of the messuages or tenements aforesaid; *and other overplus thereof remaining, I will shall be to the use and behoof of the said company of Skinners, to order and dispose at their wills and pleasures.*"

It having been decided that a large portion of the lands mentioned in the will did not pass by it, but that they were disposed of by a prior declaration of trust (*s*), and the annual value of the lands having greatly increased, the question raised by the information was, whether the *Skinners' Company* were bound to apply the whole profits of the premises to the charities mentioned in the will, or were entitled, after making the pecuniary payments specified by Sir *A. Judd*, to retain the surplus rents for their own use.

In the construction of the will with respect to such lands as the testator had power to devise, it became necessary to consider two questions: the first was, whether, according to the true construction of the will, the corporation of *Skinners* were *mere trustees*, or had themselves an interest in the fund; the second, whether, if they had an interest in the fund, an apportionment must be made of the increased rents between the *quantum* of that interest and the *quantum* of interest given

(*s*) *Ante*, pp. 551—556.

by the will to other purposes, regard being had to the increase that had taken place in the produce of the whole.

Lord *Eldon* decided that there was a final gift of the surplus rents and profits to the *Skinners' Company* for their own benefit, as it appeared on the face of the will that the testator contemplated that there might be an overplus after the particular payments were discharged, and had expressly given such surplus to the *Skinners' Company*, "*to order and dispose of at their wills and pleasures*;" which expression was controlled neither by the introductory nor the other parts of the will.

The surplus having been decided to belong to the *Skinners' Company*, another question was, whether the surplus was to be constituted by making only the specific payments mentioned in the prior part of the will, and no other; or whether the objects of the testator's bounty, who were mentioned in the prior part of the will, had a right to say that, looking at what was the value of the surplus rents after making the specified payments at the time of the testator's death, there should be an apportionment of the whole rents between them and the company, so that the increased rents should be divided between the different charities and the *Skinners' Company*, in the same proportion in which the rents of the estates at the testator's death were then payable. Lord *Eldon* was of opinion that there could not be such an apportionment.

In consequence of the great increase in the rental of the lands which were exclusively appropriated to the school, the scheme for the establishment of the school approved by the master and confirmed by the court, was on a very large and extended scale, and embraced among other things, the erection of very extensive buildings. Hence it became a question of importance, whether the lands which passed under the devise ought to contribute their proportion, according to their relative value, to all the repairs of the premises erected or to be erected, according to such enlarged scale, for the purposes of the school.

Upon that part of the case Lord *Eldon* observed, "this testator did not look to the increase of the buildings of the

school, or to such an increase of the charitable purposes as had actually taken place independently of the will. The authority to cause enlarged buildings to be erected, was derived, not from the will, but from other instruments; and the reparations meant by the will, could not be reparations of things not mentioned in, nor sanctioned by the will. Where a testator has directed a school-house, which he has erected, to be repaired, and certain almshouses and other tenements mentioned in his will to be also repaired, out of the residue of the rents and profits, can there be any ground for saying that the overplus, which shall remain after such reparations are made, and which he has given to the *Skinners' Company*, shall be diminished by the application of part of the rents to the reparation of buildings made in addition to the charity, which could not have been erected under the authority of the will? I think not. The consequence is, that if the school-house does not remain such as it was in the time of Sir *A. Judd*, the surplus rents of the devised lands cannot be charged with contributing a larger sum towards its repairs, than would have been thence contributed if the school-house had remained in its ancient state. That surplus must repair the school-house to the same extent as if no increase in the charity had taken place, but not to a greater extent (*t*).

Henry Fisher, by deed dated 4th April, in the 4th year of the reign of Queen Elizabeth, after reciting that he was

(*t*) The decree declared, that according to the true construction and effect of the instrument called the will of Sir *A. Judd*, the *Skinners' Company* became, and were then entitled for their own use and benefit, to the rents and profits of such of the messuages and premises devised by the said instrument as consisted of the several particulars set forth in the 4th schedule to the master's report, subject to the payment thereout of such only of the several specific sums in the said will mentioned, as thereinafter set forth, *viz.*, 4*s.* to be paid weekly to the six almsmen at *St. Helen's*, in manner and form as in the will is directed—the yearly sum of 10*s.* to the renter-warden of the company—the annual sum of 25*s.* 4*d.* for coals to be distributed among the six almsmen as in the will is directed—and also subject to a contribution out of the said rents and profits towards the reparation, from time to

instigated by piety, as well for the better sustentation of the free grammar-school founded by Sir *A. Judd*, in *Tonbridge, Kent*, as for the sustentation of one student in the University of *Oxford*, granted to the *Skinners' Company*, governors of the possessions, revenues, and goods of the said free school, certain messuages in the city of *London*, to hold to the said company, governors as aforesaid, and to their successors, to fulfil the works, uses, and intentions expressed in a schedule to the grant.

The schedule declared that the company and their successors should yearly, for ever, pay to a scholar, to be chosen by them and placed in *Brazen Nose College, Oxford*, the sum of 53*s.* 4*d.*, and the sum of 13*s.* 4*d.* yearly to his tutor; to the principal and scholars of the same college, yearly, 33*s.* 4*d.*, to the end that they might assist the company in providing a meet

time since the filing of the information, of such part of the messuage or tenement used as the school-premises at *Tonbridge*, as was originally erected for that purpose—and also subject to a contribution towards the sum of 150*l.* which had been annually allowed to the defendants in taking their accounts in the cause, for the expense of visiting the school at *Tonbridge* in times past; and also towards the sum of 200*l.* allowed for that purpose by the scheme for the establishment of the school—such contributions for repairs, and for the past and future expense of visiting the school, to be apportioned and made according to the relative annual value of the said messuages and premises devised by the instrument or will of the said Sir *A. Judd*, with the annual value of the messuages and premises mentioned to have been purchased of *J. Gates* and *T. Thorogood*, such present annual values to be ascertained by the master.

Directions were next given for taking certain accounts for ascertaining the proportion of the past expenses of repairs and visitations, which, according to the preceding declaration, ought to have been borne by the devised estates—and for charging the defendants with such proportion; and the decree then proceeded,—"And it is ordered, that the defendants in all future accounts, as tenants of the said trust estate, give credit or allow for the proportion of the sum of 200*l.* for the expense of visiting the school, and also the proportion of the said repairs, which ought to be borne by the devised estates; having regard at all times thereafter to their relative annual value with the said other estates purchased of *J. Gates* and *T. Thorogood.*" *Attorney General* v. *The Skinners' Company*, 2 Russ. 407—448; Reg. Lib. A. 1825, fol. 2319, 2320.

schoolmaster and usher to the said school. The company was further directed, twice every year, to pay 10*s.* for two sermons, to be preached in *St. John's, Walbrooke,* before the company; and such preacher was directed to exhort the company to virtue and concord, and to be *favourable and beneficial maintainers of the said school.* It further directed the company to allow certain persons, therein named, to hold some tenements, during their lives, at a rent of 6*s.* 8*d.*; and after the decease of any of the said tenants, it was declared that the company should, from time to time, bestow the said tenements upon such poor and decayed men or women of the said company as, in their discretions, should be thought meet, at the same rent as was before directed to be paid by the tenants.

It appeared that at the time when the grant was made, the yearly rents of the tenements in question amounted altogether to 10*l.* 13*s.* 4*d.*, and that the whole sums of money which were to be distributed, including the four annual rents of 6*s.* 8*d.*, only amounted to 7*l.* 6*s.* 8*d*; there was, therefore, at the time when the grant was made, a surplus of 3*l.* 6*s.* 8*d.* The rents of the hereditaments comprised in the deed of gift had, from 1823, amounted to 149*l.* 4*s.* The information and bill, filed at the relation of the head-master of *Tonbridge School,* and by a student of *Brazen Nose College, Oxford,* prayed that it might be declared that the hereditaments comprised in the deed of gift were vested in the company, and were held by them for charitable purposes only, and not for their own use and benefit; that the rents ought to be applied in and towards the sustentation, exhibition, and finding of the plaintiff, whilst he should continue to be a student of *Brazen Nose College,* and of the future students there to be elected, and for the other purposes of trust mentioned in the schedule, and for the better sustentation of the school; and that an account might be taken of the rents of the hereditaments of the gift of *H. Fisher,* received by the company, and that they might be declared to be answerable for the misapplication thereof; and that it might be declared that the payments to the plaintiff, his tutor, and the college ought to be in-

creased; and that it might be referred to the master to settle the amount of such increase, and to inquire into all the charitable purposes to which the rents were applicable, and to settle a plan for the future application thereof.

Sir *L. Shadwell*, V.C., considered it plain that there was no devotion of the whole of the rents to charitable purposes, and that it could not be collected from the words of the grant that any such devotion was intended by the donor; and, moreover, there had been a uniform usage, from the time when the grant was made, for the *Skinners' Company* to take to themselves and apply to their own use, the surplus of the revenues beyond what would satisfy the several sums, making collectively the 6*l.*, and the four small sums, which were the rents at which the small tenements were to be let to decayed men and women. The court also relied on the fact, that by deeds of compromise entered into between the *Skinners' Company*, as guardians of the school, and *Brazen Nose College*, the payments which were appointed by *Fisher's* deed not having been made for a long lapse of years, the *Skinners' Company* had entered into a compromise with the college; and the company, assuming to deal with the surplus-rents as their own property, had contracted to pay to the college certain increased sums in respect of the past arrears.

The information and bill were dismissed with costs, and it was declared that according to the true construction of the deed of gift, and the schedule thereto, and the said acts of parliament (*u*), the *Skinners' Company* were beneficially entitled to the surplus rents of the estates, after providing for the payments directed to be made by the deed of gift and the schedule (*v*).

In another case, a testator devised an estate to the *Fishmongers' Company*, to buy and distribute yearly, 138 quarters of coals, or money to buy coals at 8*d.* per quarter, amongst the poor; and added, that the sum total in money for the 138 quarters, at the price aforesaid, amounted to 4*l.* 12*s.*, and directed that if the coals could be bought for less,

(*u*) *Ante*, pp. 553—555.

(*v*) *Attorney General* v. *Skinners' Company*, 5 Sim. 596—618.

more should be given. The testator then gave 40*s.*, out of the residue of the rents, to the company for executing his will, and directed that whatsoever remained should be disposed of in repairing the buildings on the estate, and to the use of the company; but if they declined to perform his will, then that the estate should go to the corporation of *London* for different charitable purposes.

A petition was presented, under the stat. 52 Geo. III. c. 101, praying that the *Fishmongers' Company* might be charged either with the amount of the cost of 138 quarters of coals at the present price, or with a sum bearing the same proportion to the money given for the purchase of coals, as the present value of the premises bore to their value at the time of the devise; and that such amount, when ascertained, might be annually laid out and distributed in coals, or otherwise be applied according to a scheme.

The petition was dismissed with costs, and it was held, that though the rents had increased, the company were not bound to distribute either in coals or in money, more than to the amount of 4*l.* 12*s.* yearly; and that they were entitled to the surplus of the rents, as the court thought that the testator did not mean that the whole of the land should go to charitable uses, but that certain specified objects should receive definite sums only, and that the surplus, whatever it might be, should go to the *Fishmongers' Company* as a benefit to them (*w*).

Lord *Brougham*, in dismissing an appeal against the decision of the vice-chancellor with costs, observed that "the whole frame and language of the will, with reference to the principles established by a series of decided cases for the construction of charitable bequests, and especially the very material proviso that if the 138 quarters of coals could be bought for less price than 4*l.* 12*s.* then more coals should be distributed, were strongly indicative of the testator's intention to limit the gift to the specified sum." His lordship added, "that any other construction than the one adopted by his Honour would shake a great number of foundations,

(*w*) *In re Yordon's Charity*, 5 Sim. 571.

where the funds had been dealt with upon the authority of the cases, and where interests had been created and objects of the eleemosynary gifts might be said to have been called into existence upon the faith of the principles which those cases had sanctioned" (*x*).

In the *Attorney General* v. *The Haberdashers' Company* (*y*), the defendants and other companies had formerly been obliged to keep a stock of corn for the supply of the *London* market, and to sell it when the lord mayor directed, and he, on some occasions, fixed the price. In 1646, an estate was conveyed to trustees in trust, to pay out of the rents certain annual sums. One of the sums was to be paid to the defendants, "for increase of their stock of corn for the service of the market in *London*," and the residue of the rents to the company, for the further increase of their stock of corn. Some of the other sums were given for clearly charitable purposes. It was held that the gift to the defendants was not a charity, and that the purpose of it having failed, they were entitled to apply it and the surplus rents to their corporate purposes (*z*).

Where the fund is given entirely to a body corporate, subject to a certain payment to some of the members of such body, the latter can only take what is given as a charge, and the surplus will belong to the head of the corporation, whose share in the fund is not fixed, although the income of it has greatly increased, unless there be circumstances clearly indicating a contrary intention. Thus, where a college or hospital was incorporated by letters-patent of James I., by the name of "The Master and Poor of the College of King James," for the relief of the poor, to consist of one master and five poor, and it was ordained that there should be one master of the hospital and the possessions thereof, who should have the cure of the souls of the parishioners of *St. Mary Magdalen, Colchester*, and celebrate divine service by himself or a curate, and that there should be five poor persons, who

(*x*) *S. C. nom. Jordeyn's Charity*, 1 Mylne & Keen, 416.

(*y*) 5 Sim. 478; *S. C.* 1 Mylne & Keen, 420.

(*z*) *Ante*, p. 86.

alone should be supported in the college, and for their support, relief, and maintenance, should receive through the hands of the master of the college annually, 52*s*. at the four usual feasts. The first objects of the charity were appointed by the letters-patent. Power was given to the master for the time being, with the assent of the attorney general or solicitor general, to make statutes for the government of the college and the goods thereof, under which no regulations had been made as to the disposition of the revenues. And it was enjoined that "all the income of the possessions that had been formerly, and should be thereafter given to the maintenance of the college, should be disposed and expended for the support of the master and poor, and for the support and repairs of the possessions of the college, according to the statutes and not otherwise." The question was, whether the estate was given to the body, consisting of master and almsmen, subject to the payment of 52*s*. to the almsmen, or whether the surplus should go to the master, whose share was not fixed, or between him and the almsmen, notwithstanding their appeared an intent to fix and limit the shares of the latter. It was decided by Lord *Brougham*, overruling the judgment of the court below, that the master was entitled to the whole surplus income (*a*).

The governors of a free grammar-school may, in some cases, make regulations as to the amount of the master's salary. By letters-patent in the 15th year of Queen Elizabeth, after reciting gifts of money to be laid out in land, for the support of a school at *Atherstone*, in *Warwickshire*, it was ordained that there should be twelve men of *Atherstone*, to be called governors of the possessions of the charity, and they were thereby incorporated, and power given to them of choosing a schoolmaster, and of making regulations respecting his conduct and stipend, to the following effect: the same governors and their successors, or the major part of them, as often as need should require, should make and

(*a*) *Attorney General* v. *Smithies*, Judg. 5; *ante*, pp. 565, 566.
1 Coop. Rep. of Lord *Brougham's*

should be able to make fit and necessary statutes and ordinances in writing concerning the ordinance and direction, as well of the schoolmaster and of the scholars for the time being, and of the stipend or salary of the said schoolmaster, and other things concerning the same school, and the preservation and disposition of the rents, revenues, and hereditaments aforesaid, and not otherwise. There was a further direction, that the rents of all the aforesaid lands, as well as those thereafter to be given to the governors, should be converted to the support and maintenance of the land aforesaid, and to the uses to be specified in the ordinances thereafter to be made. In 1607, the governors of the school, who had been appointed under the foundation, made certain orders in exercise of their authority, whereby they ordered that the produce of the charity lands above the sum of 220*l.* should, after defraying the necessary expenses, be kept by the bailiffs (who were the collectors of the rents), for contingencies for twenty-one years. The master of the school was elected in 1817, when he signed an agreement with the governors to accept a stipend of 110*l.* a-year (the whole rents being 220*l.*) and to follow certain regulations prescribed by the governors. A similar agreement had been signed by his predecessors, and it had been stated in the advertisement announcing the election, that the master would be expected to sign such an agreement. The object of the information was, to obtain for the schoolmaster the surplus rents of the premises, and to set aside the agreement of 1817. The master to whom the matter was referred, had reported in favour of the right of the schoolmaster, and his report, on being excepted to, had been confirmed by the master of the rolls on that point. But Lord *Brougham*, on appeal held, that, by the statutes of the school, the governors had a power over the schoolmaster's salary, and might vary it from time to time, and apply the surplus to other purposes. That there was no reason to support the finding, that the whole surplus belonged to the master, unless it were contended that the whole funds being destined to support a *grammar* school, no other school could be main-

tained out of them. But then, the governors were not bound to maintain a grammar-school with only one schoolmaster and no ushers. Nay, they might have other purposes strictly connected with keeping a grammar-school, and which might be furthered by applying a portion of the rents; so that his lordship had no doubt of the foundation and ordinances of 1607, taken together, leaving the control of the fund in the governors, and leaving them the power of attaching a reasonable salary to the office of the master. But then, it must be done by a general regulation or ordinance; and his lordship was of opinion that it was wrong to do it by way of agreement with the schoolmaster on his appointment. It would have been much more correct to have made the usual rule as to the salary, and then made the appointment. The other course which had been pursued, opens the door to bargaining, and to abuses of a dangerous kind. Furthermore, in making general regulations as to stipend, the governors were to exercise a sound discretion, and if they did not, it was matter of review by the Court of Chancery by information or by petition. It was declared that the governors should, from time to time, make general ordinances and regulations for appointing a reasonable and proper stipend to the master, and for disposing of any yearly surplus in conformity to the objects of the foundation, having regard always to the keeping a sufficient fund in their hands for meeting contingent expenses, such fund not to be less than 60*l.* a year, whereof 25*l.* to accumulate (*b*).

Where a fund is given to the members of a corporate body as trustees for the maintenance of a school, if such fund is not given out and out, but only as the trustees may think best to apply it for the advantage of the school, the surplus, after satisfying the exact charge first created upon the fund, belongs to the trustees.

An information was filed to obtain the decree and direc-

(*b*) *Attorney General* v. *Governors of the Free School of Atherstone*, Aug. 1834; Reg. lib. A. 1833, fol. 8 1419; *ante*, pp. 352, 353

tions of the court for the better maintenance and augmentation of the free school at *Middleton* in the county of *Lancaster*, founded by letters-patent of Queen Elizabeth, dated 11th August, 1572, and for the application of the surplus rents, and the fines arising from the charity estates in question in the cause, to those purposes, such surplus income having been applied by *Brazen Nose College*, in *Oxford*, to their own use, or for their general corporate purposes.

Queen Elizabeth, by letters-patent, dated 11th August, 1572, upon the application of *A. Nowell*, then dean of *St. Paul's*, created and founded a grammar school in the parish of *Middleton* in *Lancashire*, with one master and one under master, to be called the "Free school of Queen Elizabeth in *Middleton*;" and after naming the first master, ordained, that any subsequent master should, during the life of *A. Nowell*, be appointed by him, and after his death by the principal and scholars of *Brazen Nose College*, and that the master should be named by *A. Nowell* during his life, and after his death by the said principal and scholars. And her majesty granted that the said principal and scholars should be the governors of the said school, and they were incorporated by the name of the principal and scholars of *King's Hall* and *College* in *Brazen Nose* in *Oxford*, governors of the free school of Queen Elizabeth in *Middleton*. And her majesty ordained, that there should be of her own foundation in the said college six scholarships, to be elected from the said free school of *Middleton*, the school of *Whalley* or *Burneley* in *Lancashire*, and failing all three, from other schools in *Lancashire*, to be called scholars of Queen Elizabeth in the college of *Brazen Nose*, and the nomination of the said scholars to be in *A. Nowell* during his life, and afterwards in the said principal and scholars, and such scholars to be incorporated with the college. And license was granted to *A. Nowell*, his heirs, &c., to found seven other scholarships in the said college, to be called scholars of Queen Elizabeth in *Brazen Nose College*, and to be incorporated with the said college, with such stipends as *A. Nowell*, his heirs, &c., should appoint. And her majesty granted to

A. Nowell during his life, and after his death, to the said principal and scholars, and their successors, power to make statutes and ordinances touching the government and direction as well of the master and under master of the school, as of the said six or seven scholars, and touching the stipends and salaries of the said master, under master, and scholars, and every thing concerning the said free scholars, and the order, government, preservation, and disposition of the rents and revenues for the support of the said free school and the scholars.

And for the furtherance of this intention, her majesty granted to the principal and scholars of *Brazen Nose College*, governors of the free school of Queen Elizabeth in *Middleton*, for their particular advantage and use, certain annual rents and profits amounting together to the clear annual sum of 20*l.*, and also her two third parts of a manor, to be held by them and their successors for ever, to this intent—that out of the premises thereby granted, and of other lands and hereditaments in future, to the use of the free school aforesaid, and the scholars aforesaid, and granted to the use of the aforesaid principal and scholars of *Brazen Nose*, governors of the free school aforesaid, or their successors, should pay for ever an annual stipend of twenty marks at the least, to the then master of the free school aforesaid, and his successors for the time being; an annual stipend of ten marks at the least, to the under master of the aforesaid free school, for the time being; and to each of the six scholars, by her as aforesaid founded, and to be chosen and elected into the college aforesaid, five marks annually. And moreover it was granted to the aforesaid principal and scholars of *Brazen Nose*, governors of the free school aforesaid, all the outgoings, rents, and profits, of all and singular, the premises thereby granted from the feast of the annunciation of the Blessed Mary, then last past, to hold the same to the same principal and scholars of the aforesaid college of her gift, without composition, or any other thing, to her, or her heirs or successors, in any manner whatsoever to be rendered, paid, or done. And by the same letters-patent, license was granted to the principal and scho-

lars of the aforesaid college, governors of the free school aforesaid and their successors, to receive and take (above the premises thereby granted, and above the lands and hereditaments received under any former letters-patent), as well for the better support and maintenance of the free school and scholars founded and to be founded, as for the support of poor students in *Brazen Nose College*, as well of her, her heirs and successors, as of the said *A. Nowell*, his heirs and assigns, or of any other person whatsoever, any lands and hereditaments not exceeding the clear yearly value of 100*l.*; and license was granted to *A. Nowell* and others, to alienate lands and hereditaments of the yearly value of 100*l.* to the principal and scholars of *Brazen Nose*, governors of the free school aforesaid, and to their successors, for the use aforesaid for ever, with license to hold in mortmain.

By letters patent, dated 25th June, 1579, Queen Elizabeth granted certain property, which had been conveyed to her by *A. Nowell*, subject to a lease of 99 years, to commence on the death of Lord *Cheyne*, at the yearly rent of 66*l.* 13*s.* 4*d.*, to the said principal and scholars of *Brazen Nose College*, governors of her free school of *Middleton* and their successors, in free alms for ever; and the queen willed that the principal and fellows of the said college should take an oath, in the public assembly, that they would pay over the rents and sums of money coming from the said premises, for the purposes thereinafter set forth, namely, to each of her majesty's thirteen poor scholars, elected out of her free-school of *Middleton*, or other schools in *Lancashire*, for their support annually the sum of 3*l.* 6*s.* 8*d.*, and to the master of the said school 23*s.* 4*d.*, and to the under master of the same school 3*l.* 6*s.* 8*d.* *per annum*, as an augmentation of their stipends; and as her majesty understood that the stipends of the principal and fellows of the said college were very small, she willed that out of the said rents they should pay 6*s.* 8*d.* every week for the improvement of the commons of the said principal and fellows, who should be present in the college during those weeks, or should be absent on college business, in certain proportions therein stated; and her majesty willed

that every principal and fellow, at the time of his election or admission, should take an oath, in the public assembly of the college, that they would expend the said rents and sums of money for the purposes aforesaid.

The annual income of the charity consisted, at the date of the last letters-patent, of the rents granted by the first letters-patent, amounting to the clear yearly sum of 20*l.*, and of the rent of the estate comprised in the second letters-patent, being 66*l.* 13*s.* 4*d.* *per annum*, which, however, was not received till after the death of Lord *Cheyne*. These sums made together 86*l.* 13*s.* 4*d.* *per annum*, out of which the payments directed to be made annually were as follows: to the head-master, 13*l.* 6*s.* 8*d.*, and as an augmentation of his stipend, 1*l.* 3*s.* 4*d.*; to the under master, 6*l.* 13*s.* 4*d.*, and for the like augmentation, 3*l.* 6*s.* 8*d.*; to the thirteen scholars, 43*l.* 6*s.* 8*d.*; and for the improvement of the commons of the principal and fellows, 17*l.* 6*s.* 8*d.*, which payments amounted altogether to 85*l.* 3*s.* 4*d.* leaving the sum of 1*l.* 10*s.* only undisposed of.

The lease of the property expired in 1686, from which time the principal and scholars granted leases of it for short terms, at the old rent of 66*l.* 13*s.* 4*d.*, but received fines, varying in amount according to the improved value of the premises, which, it was admitted, would yield at a rack rent, the annual sum of 844*l.* For upwards of a century, the college had ceased to apply any part of the income of the charity estates to the charitable purposes directed by the letters-patent, except so much as was sufficient for the payment of the stipends to the head master and under master of the school at *Middleton*, and ever since the expiration of the lease, the surplus rents of the estates, including the fines received on the renewal of leases had been applied towards the general corporate purposes of *Brazen Nose College*. It appeared that the whole property comprised in the letters-patent was directly or indirectly derived from *A. Nowell;* and that Queen Elizabeth was merely instrumental to his intentions. The question in the cause was, whether it was the intention of *A. Nowell*, the founder, that the property comprised in the two letters-patent should be held bene-

ficially by the college, charged only with the particular payments stated, or should be wholly applied to the charitable purposes therein expressed. Sir *J. Leach*, M. R. considered the second letters-patent as substantially the act and deed of *A. Nowell*, and in effect an exercise of the power reserved by the first letters-patent of fixing the stipends of the master, under master, and scholars. He also observed, that in the first letters-patent, the license to hold lands was not confined to the new foundation; but for the support of poor scholars, and for augmenting the number of scholars and students in the college. The conduct of *A. Nowell*, when he afterwards became principal of the college, was insisted upon as evidence of his intention. During the time he was principal, and also visitor of the new establishment, not only was the surplus of the rents applied for the benefit of the college, but the stipends destined for the scholars, and not applied for want of objects, were applied to general collegiate purposes. At his request, a beneficial lease was confirmed by the college, to his wife and her son; and afterwards, at his request, arrears of rent due from such lessees, were released by the college; and, at his request, license was given to him by the college to present a fit person to the chapelry, comprised in the second letters-patent, he thereby treating the college as entitled to the property, subject to specified charges.

His Honour thought there was more of form than of substance in the objection, that the college could not be intended to be benefited, because the gift was to the college, not in their ancient collegiate and corporate character, but in their corporate character as governors of the free school in *Middleton*; for although the name was different, the corporate body was the same, and both letters-patent contemplated a benefit to them in their collegiate character. Upon the whole, *A. Nowell*, being substantially the founder of the establishment, and the true inquiry being as to his intention, and the language of the letters-patent being favourable, and not adverse to the intention which was to be collected from his conduct; his Honour did not consider himself at liberty to

overturn a usage which had prevailed in the college from the time of the letters-patent; and, therefore, the information was dismissed without costs (*x*).

The decree of the master of the rolls was confirmed by the House of Lords. Lord *Brougham* founded his first observation in favour of the college, upon the fact, that a clear surplus of 1*l.* 10*s.* was unappropriated by the foundation, and did not consider that sum of trifling amount, compared with the whole value at the time of the gift; and thought that the defalcation of the 1*l.* 10*s.* not given, took it out of the rule in the *Thetford* case (*y*), and left it to rest on the other general principles governing such questions. His lordship inferred the founder's intention from two circumstances; 1st, that the *Middleton* school was not the only object of the bounty of the founder, but the six scholarships to *Brazen Nose* were included therein, and those six scholarships were not to be taken from *Middleton* school lads solely, but might be filled from *Whalley* and *Burneley*, which are not mentioned in the endowment, and failing *Whalley* and *Burneley*, might also be taken from other schools; 2nd, that the poor scholars were to receive the benefit of *Brazen Nose* quite independently of *Middleton*, or even *Whalley* or *Burneley*, or even *Lancashire* scholars at all, they were to receive the benefit of the other lands, to the amount of 100*l.* a-year, to take and hold which in mortmain, license was given.

The other circumstances were, that the rules, and regulations, and ordinances, which the governors were empowered to make, were perfectly general; all matters touching the school and its concerns were, from time to time, to be made by those ordinances, which were to be specifically directed to the revenues, receipt, management, and disposition of the funds. The last circumstance relied on was the lapse of 250 years since the foundation of the charity, without any visible trace of any other application of the surplus, except to *Brazen Nose College*, which, although not decisive, was a very

(*x*) *Attorney General* v. *Brazen Nose College*, Reg. lib. A. 1831, fol. 546.

(*y*) 8 Rep. 130 b. *Ante*, pp. 545, 738. See 5 Sim. 617.

strong circumstance, raising a great obstacle to any alteration, in the practice of disposing of the fund (*x*).

In the sixth year of Henry VIII. license was granted to *John Dowman*, to found in *Pocklington* a guild or fraternity, consisting of a master, two guardians, and others; and to convey to them lands to the value of twenty marks, in order to find a fit man sufficiently learned in grammatical science to instruct all scholars resorting to *Pocklington*. In the 17th Henry VIII., *Dowman* by a deed conveyed certain lands to the master and fellows of *St. John's College, Cambridge*, to the intent that they should maintain in their college five scholars, to be nominated by the said fraternity, a preference being given to those of the founder's name and kin, and to young men educated at *Pocklington* grammar-school. An act of the 5th Edward VI., after noticing the dissolution of the aforesaid fraternity, gave to the college the power of appointing a schoolmaster of the said grammar-school, and gave to the said schoolmaster and the churchwardens of *Pocklington* power to appoint an usher, and incorporated the schoolmaster and usher; and enacted, that upon vacancies in the five scholars, the master of the school, with the vicar and curate and churchwardens of *Pocklington*, should nominate such number of scholars out of the school as would supply the vacancies, and present them to the college; and such scholars were to be received into the college, and to have the like exhibition as any other scholars presented by the fraternity ought to have according to *Dowman's* composition; and if the college omitted to appoint a schoolmaster, and if the schoolmaster and churchwardens omitted to appoint an usher, power of appointing both master and usher was given to the Archbishop of *York*. The rents of the lands comprised in the endowments amounted to 600*l.* a-year; the college had not for many years paid any sum for the maintenance of scholars from *Pocklington* school, but had applied the rents, except 1*l.* 4*s.* 11*d.*, to their own use; and no scholars from that

(*x*) *Attorney General* v. *Brazen Nose College*, 2 Clark & Finn. 295. *Ante*, p. 565.

school had for many years been maintained in the college, except in the year preceding the filing of the information, one scholar was allowed 1*l.* 4*s.* 11*d.* for his maintenance during his residence of one term in the college. An information filed against the college prayed an account of the property conveyed to the college, and a declaration that all the rents and accumulations were applicable in maintaining the five scholarships; for an account of such rents, and a reference to the master to approve a scheme for the application of the same, and for the establishment of the said five scholarships. One question was, whether the college were entitled beneficially to the *Dowman* estates, subject to the particular charges specified in the deed, or were they only trustees or otherwise bound to bestow the whole rents of such estates on the scholarships. Lord *Brougham* concluded that the endowment plainly vested the beneficial interest in the college, subject to a charge to maintain five scholars, presented by the corporation of *Pocklington* school, in a way pointed out—to maintain them by allowances, which, though not specified in moneys numbered, were ascertained by reference to the allowances of the other scholars on the foundation. His lordship thought the circumstance, that no sums of money were specified, strong in favour of such a construction; for it could make no difference as to that question, whether the founder stated the sums with which he charged his estates in the hands of the college, or directed so much to be paid as at any given time should be received by the other scholars.

The deed between *Dowman* and the college resembled a bargain between the parties to do and receive certain things, or a gift of the estate by one to the other, charged with certain outgoings; and none of those things were to be found in it, which had sometimes been held to show a distribution of the whole rents among the persons to whom the feoffees were directed to pay; and sometimes to make it doubtful, whether the feoffees or those payees were the principal objects of the foundation; as where the whole fund is exhausted by the payments prescribed, or where the gift is to

both the feoffees and the others together, and in the same words (*z*).

Where a residue is disposed of by will, for charitable purposes, the particular words of the gift may confine it to what appeared to be the amount in the donor's contemplation, so as to prevent a lapsed legacy from falling into the fund. Thus, where a testator gave 20,000*l.* for charitable uses, which were void under the mortmain act; and he gave to an hospital 100*l.*, if there remained enough of his personal estate to satisfy it, but if not, or in case there remained but little, that then the 100*l.* should not be paid, and the small remainder of his estate should be left to his executor, to dispose of it in charity schools in H. So as it was likewise his will, that if his personal estate should sufficiently reach towards satisfying all the legacies by him bequeathed, then his executors should also dispose of the remainder in favour of charity schools in H.

Lord *Camden* held that the charity schools had no right to the lapsed legacy of 20,000*l.* as residuary legatees; since the testator's intent appeared strong to confine the residue to what should remain after the other legacies were paid. If there should not be sufficient to pay the 100*l.* to the hospital, then he gave that pittance to the charity schools as a residue; or if there should be enough, and a little more, then he gave that little overplus to them (*a*).

It is an established principle in the case of a specific gift, that the court will only inquire whether the specific thing remained at the death of the testator, and will not enter into the consideration whether it has or not ceased to exist, by an intention to adeem on the part of the testator (*b*).

Demonstrative legacies, as they are called in the civil law, are pecuniary legacies, with a particular security, to which

(*z*) *Attorney General* v. *St. John's College, Cambridge*, 1 Coop. Rep. Lord *Brougham's* Judg. 394—410. *Ante*, pp. 447, 451, 452. See 19 Rep. Commissioners of Charities, 541—546, as to the *Pocklington Grammar School.*

(*a*) *Attorney General* v. *Johnstone*, Ambl. 577; *Ante*, p. 116, n. (*k*)

(*b*) *Barker* v. *Rayner*, 5 Madd. 217, 218.

effect will be given, although the particular security intended by the testator happen to fail (*c*).

But in the *Attorney General* v. *Parkin* (*d*), where a testator enumerating mortgages, bonds, and notes due to him, gave the interest to a party for life, and then directed that the mortgages, bonds, and notes should be vested in the master, fellows, and scholars of *Pembroke Hall* in *Cambridge*, in trust to found six scholarships of exhibitions. The testator having, after the execution of his will, received the money due on some of the securities, and taken new ones; on a question whether the legacies to the college were adeemed, the bequest was construed as of so much money as was equal to the money owing to him on the several securities, and it was decreed, that the amount of such of the debts bequeathed to the college as had been paid to the testator between the time of making his will and his death, ought to be paid out of the testator's general estate (*e*).

4. *Of the acceptance of estates given in trust for charities.*] The devisees of an estate to be held on trust for charitable purposes may suspend, for a reasonable time, their acceptance or refusal of such trust; and any intermediate acts, done merely for the preservation of the subject of devise, will not bind them to a conclusive acceptance. But when possession of an estate, given subject to a condition on behalf of a charity, has been entered upon, under such circumstances as to imply a positive acceptance of the devise, the devisees are bound, at all events, to perform the conditions, even although the rents and produce should eventually prove inadequate for that purpose; they can make no special agreement, but must either take the estate saddled with the charity as it is given, or renounce it; it is with a view of

(*c*) *Fowler* v. *Willoughby*, 2 Sim. & Stu. 354; *Coleman* v. *Coleman*, 2 Ves. jun. 638; *Roberts* v. *Pocock*, 4 Ves. 150; *Kirby* v. *Potter*, Id. 748; *Raymond* v. *Brodbelt*, 5 Ves. 199; *Le Grice* v. *Finch*, 3 Mer. 50. See *Newbold* v. *Roadknight*, 1 Russ. & M. 677.

(*d*) Ambl. 566, and note by Blunt.

(*e*) On the ademption of legacies, see 1 Rop. on Leg. 286—353, 3d ed.

allowing due time for taking the alternative into consideration, that the suspension of their determination is allowed (*f*).

A college to whose use estates were devised for founding new scholarships, and for accumulating the remainder of the rents for making additional buildings to the college, after the determination of several estates for life, was held not to have accepted the devise by executing a deed and doing other acts for the preservation of the funds, in order to prevent an immediate suit for their application, and by engaging that the funds should be applied according to the trusts of the will; the college having, on an information filed after the death of the last tenant for life, declined to act in the trusts of the will and refused the bequests (*g*).

An estate being devised to *Christ's Hospital*, on condition of maintaining six children from the parish of *St. Leonard, Shoreditch*, and the hospital having taken possession; the rents at first proved insufficient to maintain the number, and the hospital had maintained only three; and an account having been exhibited to the governors, the latter had been satisfied. But upon filing an information, it was found that there had been a mistake in the account, and that the rents had not been expended, although it appeared they were then sufficient to maintain the whole number of children. Lord *Thurlow* thought, whether the rents were or were not sufficient to maintain the number, the hospital, having taken possession of the estate, was bound to perform the condition; and that they should have considered of that previously to taking possession (*h*).

The founder of *Guy's Hospital*, after mentioning a charter of incorporation which he intended that charity should obtain, by his will gave to the president and governors of *Christ's Hospital* in *London*, and their successors for ever, an annuity

(*f*) *Attorney General*, v. *Christ's Hospital*, 3 Br. C. C. 165; *St. John's College, Cambridge* v. *Platt*, Rep. temp. Finch, 222; *Attorney General* v. *Master of Catharine Hall, Cambridge*, Jac. Rep. 392.

(*g*) *Attorney General* v. *Andrew*, 3 Ves. 633. *Post*, p. 607.

(*h*) *Attorney General* v. *Christ's Hospital*, 3 Br. C. C. 165. See Lord *Evre* v. *Strickland*, Cro. Jac. 240; *Brett* v. *Cumberland*, Id. 521.

of 400*l.*, upon condition that his executors and such intended corporation and their successors, should have liberty yearly, and every year for ever, to put into *Christ's Hospital* four children, to be educated and maintained in the same manner as the other objects of that charity; and it was provided, that if the governors of that hospital refused to admit such four children, then the testator's executors and the said intended corporation were directed to apply the said annual sum of 400*l.* to the education and maintenance of such poor children in such other school as they should think fit. The governors having accepted the legacy, complied with the condition for more than a century, and afterwards contended, that they were not bound, but were at liberty to abandon the gift, together with the condition annexed to it, whenever they thought fit. Sir *J. Leach*, M. R. said, "If the annuity were given to *Christ's Hospital* for such time only as they should continue to act upon the condition, then, indeed, they would be at liberty to retire from it at their pleasure. But here the annuity is given to them and their successors for ever; and having once accepted it, they are for ever bound by the condition. The latter part of the clause, which authorises the executors or the intended corporation to apply the 400*l.* a-year in another manner, if the governors of *Christ's Hospital* shall refuse or neglect to act under the condition, is not to be considered as authorising that refusal or neglect, but as a collateral remedy to secure, at all events, the testator's charitable intention" (*i*).

Where a decree was complained of, because it gave the surplus of the rents of the charity estate, after maintaining a certain number of exhibitions, for the benefit of *Baliol College*, which was constituted a trustee by the testator, Lord *Hardwicke* thought that the college might be right in insisting upon some advantages to themselves, as without it there might have been a difficulty in prevailing upon the college to accept a bye foundation to entertain six or more members who had received their first education for two or three years in a

(*i*) *Attorney General* v. *Christ's Hospital*, 1 Russ. & M. 626.

Scotch university, professing principles different from that of the college (*k*).

Where an agreement was made by a college with a descendant of the testator, not conformable to his will, the court declared such agreement void: for though the college might have waived the gift, they could not alter it by any agreement, because in effect that would have made them founders, and to hold the charity upon their own terms (*l*).

A testator devised 50*l.* *per annum* for a lecturer in polemical or casuistical divinity, so as he was a bachelor or doctor in divinity, and *fifty* years of age, and would read five lectures every term, and at the end of every term deliver four copies of the same to be kept in the university; and in default of such a lecturer, he gave the 50*l.* to ——— *College*, in *Oxford*. Upon an information, the university of *Cambridge*, with the consent of the testator's heir-at-law, wanted to modify the gift by making a man of forty years of age capable of the salary, and requiring three lectures only every term, and the delivery of four copies of them once a year; but the court, though no one opposed the application, refused to intermeddle, and said that they should be held to the letter of the charity, and that the heir had no power to alter the disposition made by his ancestor (*m*).

A corporation which was bound to pay out of the revenues of charity lands a certain annual sum to a college, in the year 1607 conveyed to the college lands then of that annual value, in satisfaction of such annual sum. The lands so conveyed, by accidental circumstances became of much greater value in proportion than the lands which were reserved by the corporation for the other purposes of the charity, yet the court would not, after the lapse of two centuries, undo an arrangement which was perfectly fair at the time between the contracting parties, and had the approbation of the executor of

(*k*) *Attorney General* v. *Baliol College, Oxford*, 9 Mod. 409, 5th ed.

(*l*) *Attorney General ex rel. St. John's College, Cambridge*, v. *Sir John Platt*, Finch. R. 221. See *ante*, pp. 283, 284; *Attorney General* v. *Hart*, Prec. Ch. 225.

(*m*) *Attorney General* v. *The Margaret and Regius Professors in Cambridge*, 1 Vern. 55.

the founder, and had become unequal only from accidents arising out of the course of time (*n*).

SECTION III.

Of the Doctrine of Cy-pres or Approximation to the Donor's intention.

1. *Where the particular objects named have failed or cannot take.*
2. *Where the Fund is more than sufficient for the objects specified,* p. 613.
3. *Of the application of the doctrine of Cy-pres to the regulation of Grammar Schools,* p. 629.
4. *When the doctrine of Cy-pres will not be applied,* p.648.
5. *Of the settlement of a scheme for the application of Charitable Funds,* p. 650.
6. *Of the apportionment of Charitable Funds,* p. 656.

1. *Where the particular objects named have failed or cannot take.*] The doctrine of *cy-pres*, that is, the rule to execute the charitable intention as nearly as possible, in its application to charities, was formerly carried to a most extravagant length (*o*); but this distinction now prevails, that the court will not decree the execution of a trust of a charity in a manner different from that intended, except so far as it is seen that, though the intention cannot be literally executed, another mode may be adopted consistent with the general intention, by which it may be carried into effect in substance, without infringing upon the rules of law. If the mode pointed out by the donor becomes, by subsequent cir-

(*n*) *Attorney General* v. *Pembroke Hall*, 2 Sim. & Stu. 441.

(*o*) 2 Ves. jun. 380; 3 Ves. 220, 141, 633, 714; 4 Ves. 14.

cumstances, impossible, the general charitable object is not to be defeated if it can be attained (*p*).

Where charity is the substance of the gift, and the particular object fails, the court will effectuate the gift to charity by providing another mode.

Thus a testator, by a codicil to his will, in 1691, directed that the residue of his personal estate should be disposed of by his executors for such charitable and pious uses as they in their discretion should think fit, but recommended to them to lay out the greater part for the advancement of the Christian religion, and appointed three executors, who afterwards laid out 5400*l.*, which was considered by them as the principal part of the testator's personal estate, in the purchase of the manor and lands of *Brafferton*, in the county of *York*, with a view to settle them, so that the income might be for ever applied to the advancement of the Christian religion. They then directed the whole annual income of the manor and lands to be applied towards the propagation of Christianity among the natives in or near *New England*, in *America*, and for advancing the knowledge of that religion in *Virginia*; which application to charity was confirmed by a decree of the court, accompanied with a direction that part of the rents should be applied by the corporation for propagating the Gospel in *New England*, and the parts adjacent in *America*, towards instructing the infidels in *Virginia* in Christianity, subject to the regulations of the Bishop of *London*, &c. The information insisted, that by the declaration of independence by the United States, it became improper to transmit any longer the rents of the estate for the charitable purposes; and it therefore prayed, that the rents then due, and the accruing rents, might be applied in some other manner in this kingdom, or in some part of his majesty's dominions, for the advancement of the Christian religion; and that the sum of 13,849*l.* 2*s.* 10*d.*

(*p*) *Attorney General* v. *Boultbee*, 2 Ves. jun. 380, 387; *S. C.* 3 Ves. 220; *Attorney General* v. *Whitchurch*, Id. 141; *Attorney General* v. *Stepney*, 10 Ves. 22.

3 *per cent.* consols. part of the charitable fund, should be invested in lands, and the rents thereof, and intermediate dividends applied to the like purposes. Lord *Thurlow*, C. after the argument, said, that the trusts to the corporation to convert neighbouring infidels, ceasing for want of objects, there being now no neighbouring infidels, the charity must be applied *de novo*. As to the other parties, he could not now consider them as corporations; therefore the master must propose a plan for the application of the produce of the estates, according to the intentions of the testator (*q*).

Lord *Craven* by his will in 1647, gave part of his property to endow scholarships at the two universities, and the residue to redeem *British* captives in *Turkey* or *Barbary*. Upon a reference to the master, it was found that there were none to redeem; and a scheme, being approved, was sanctioned by the court for using all the fund, except a moderate portion set apart in case captives should be made, and for applying the residue to increase the number and income of the scholars (*r*).

The doctrine of *cy-pres* is applicable, notwithstanding the trustees are positively forbidden to diminish the capital of the fund, or to apply the interest to any other use or uses than those directed by the will, if some of the particular objects specified have failed.

Thus a testator gave the residue of his estate to the company or corporation of *Ironmongers* of the city of *London*, and to their successors, making them his executors upon special trust, that they did, with all convenient speed after his decease, place his estate out at interest upon good securities, positively forbidding them to diminish the capital sum by giving away any part thereof, or the interest to any other use or uses than thereinafter mentioned and directed, *viz.* that they do pay one full half part of the said interest and profit of his whole estate, yearly, and every year for ever,

(*q*) *Attorney General* v. *City of London*, 3 Br. C. C. 171; *S. C.* 1 Ves. Jun. 143.

(*r*) *Attorney General* v. *The Bishop of Llandaff*, cited 2 Mylne & Keen, 586.

unto the redemption of *British* slaves in *Turkey* or *Barbary;* one full fourth part of the said interest and profit, yearly and every year for ever, unto charity schools in the city and suburbs of *London*, where the education is according to the church of *England*, in which number, that in this parish is to be always included, and not giving to any one above 20*l.* a-year; and the other fourth part of the interest was given for certain other charitable purposes therein mentioned. The question was, how the income of the property given for the redemption of *British* slaves in *Turkey* or *Barbary*, was to be applied; the altered circumstances of those countries having at that time left little or no demand for the application of that bounty of the testator. Sir *John Leach*, M. R. said, "the jurisdiction of courts of equity with respect to charitable bequests is derived from their authority to carry into execution the trusts of any will or other instrument, and the court is to proceed according to the intention expressed in the will or instrument. Here the testator wills that one moiety of the income of his property shall be applied to the redemption of *British* slaves in *Turkey* or *Barbary*, and to no other use. If this court were to take upon itself to apply the moiety of the testator's property in question to any other use, it would not be executing the expressed intention of the testator, but would be acting in direct opposition to that intention. I cannot, therefore, assume a jurisdiction to devote this property to any other purpose, although it is extremely fit that some beneficial use should now be made of it. But it appears to me that this can only be effected by the supreme power of the legislature, and that I must refer it to the master to approve of a scheme for the future application of this property to be submitted to the consideration of the legislature, and the attorney general and the parties interested in the disposition of the other half of the testator's estate, are to attend the master upon the reference as to such scheme." But on appeal, Lord *Brougham* held, that as there were no slaves to redeem, the court had jurisdiction to apply the fund to other charitable purposes, and had nothing to do with direct-

ing bills to be brought in for the purpose of extending the power of the court to objects of bounty not named in the will, nor in the testator's contemplation; the only question being upon the construction of the will.

When a testator gives one charitable fund to three several classes of objects, unless he excludes by most express provisions the application of one portion to the purpose to which the others are destined; it is clear that the court may thus execute his intention, in the event of an impossibility of applying that portion to its original destination. Where the character of charity is impressed on the whole fund, there is good sense in presuming that, had the testator known that one object was to fail, he would have given its appropriated fund to the increase of the funds destined to the other objects of his bounty; and there is convenience in acting as he would himself have done. This is the foundation of the doctrine of *cy-pres*.

The object of the testator's general prohibition, neither to diminish the capital nor to apply the interest to any other uses, plainly is to secure the whole fund, principal and interest, to charitable uses; to forbid any alienation of the capital, and any diversion of the income to any other purposes than those which he specifies. The expression, "use or uses," even literally taken, lets in all the charities specified, provided the fund be given among them, and not otherwise applied. Undoubtedly, the funds must be applied in the proportions specified; one half to one, and one fourth to each of the two other objects; and it would be a breach of trust to give part of the moiety to either of the two other purposes, as long as there remained captives to redeem. But then, it would be just as much a breach of trust without the prohibitory clause, as with it. If I bequeath 100*l.* to A. and 50*l.* to each of two other persons, B. & C., my will is broken if my executor gives B. & C. more than 50*l.* each, taking the excess out of A.'s 100*l.*; but it is not the more broken because I use words of superfluity, and say, "I bequeath 200*l.* as follows, and to no other use or uses." So, here the prohibition is merely superfluous, and has no greater ope-

ration in preventing an appropriation of the fund, in proportions different from those specified, than if the prohibition had been entirely omitted; *expressio eorum quæ tacitè insunt nihil operatur.* The decree was therefore altered, as regarded the declaration and the reference to approve of a scheme to be submitted to parliament; and instead of that, it was declared that the court had jurisdiction to apply the surplus income of the moiety of the charity property in question in the cause, and the accumulations thereof, as near as might be to the intentions of the testator, having regard to the bequest touching *British* captives, and also to the other charitable bequests in the will, and it was referred back to the master to approve a proper scheme for such application (*s*).

A testator devised a freehold messuage at *Romford* to the charity school there, and directed the rents to be applied for the benefit of the said school, so long as it should continue to be endowed with charity, and then gave a sum of money to the *Coopers' Company,* "to build almshouses at *Romford.*"

The court decreed the application of the rents of the messuage for the benefit of the school, in the words of the will, and directed the legacy to be placed out, and the interest thereof to be distributed for the increase of the allowance of the alms people, belonging to the alms-houses of the *Coopers' Company.*

Lord *Hardwicke* said, "The general intention of the testator was to give a charity to the town of *Romford* and the *Coopers' Company;* but if the trust cannot be satisfied in the very terms intended by the testator, yet a wrong description and falling short will not defeat the legacy, for there are many cases where a trust for charity cannot take place according to the strict intent of the testator, and still the charity shall not entirely fail, but the court will direct the application of it as far as they can, to carry the intent of

(*s*) *Attorney General* v. *The Ironmongers' Company,* 2 Mylne & Keen, 576—589.

the testator into execution, or at least nearest to the intent (*t*).

Where a testator, by his will, charged his real and personal estate with an annual sum or exhibition for the maintenance of *Scotchmen* in the University of Oxford, to be sent into Scotland to propagate the doctrine and discipline of the Church of England there, presbyters being settled in Scotland by act of parliament. It was decreed as to the charity, that the trustees named in the will should convey over the estate in question to the six senior fellows of *Baliol College, Oxford,* (one of the colleges named in the testator's will) subject to the mortgages, annuities, &c. as therein mentioned to be disposed of as in the said decree particularly mentioned, the end of the decree being for "the effectual execution of the said trust as near as can be to the said will and intention," the heir-at-law, &c. to have their costs (*u*).

Where the testator has a double object, part of which fails, there will be an application *cy-pres.*

Trinity Hall in *Cambridge* devisee in remainder after estates for lives, in trust, for founding four new scholarships, for making additional buildings to that college, and for founding four new fellowships, were held not to have accepted the devise, by acts done merely for the preservation of the fund; and upon their refusal to accept it, after the death of the tenant for life, the court directed the master to receive a proposal in order to have it considered whether it could be executed *cy-pres;* and the testator having expressed in his will, that no person should be qualified for the scholarships and fellowships he intended to found, unless they should have been educated in *Merchant Tailors' School,* the master was particularly directed to receive a proposal on the part of that school, for the establishment of a charity within the terms of the testator's will (*v*). A compromise

(*t*) *Attorney-General* v. *Pyle,* 1 Atk. 435.

(*u*) *Attorney General,* v. *Guise,* 2 Vern. 266; Reg. lib. A. 1692, n. by Raithby, fol. 1074. See *Attorney General* v. *Baliol College, Oxford,* 9 Mod. 407, 5th ed.

(*v*) *Attorney-General* v. *Andrew,* 3 Ves. 633, 639.

afterwards taking place to apply part of the fund to an establishment at *St. John's College*, in *Oxford*, with which college the *Merchant Tailors' Company* are connected, and to give the rest to the next of kin, it was, with the consent of the attorney general, established by decree. And the next of kin, after this compromise, having filed a bill against *Trinity Hall*, for an account, the bill was dismissed, the court holding the next of kin bound by the compromise (*w*).

The court will not direct an application *cy-pres* until it has been ascertained whether there will be a surplus, after answering the original purposes of the gift. By charter of incorporation granted by Richard II. in the 19th year of his reign, after reciting that the town of *Galway* was the key of that part of *Ireland*, and lay exposed on all sides to enemies and rebels, so that the burgesses of the town, and others dwelling therein, and strangers resorting thereto, could not conduct their necessary business, in going to and from the town; and that the burgesses for the safety of the town, had maintained divers men for defence at their own charges, to their own impoverishment. He, therefore, to enable them the better to resist their enemies, gave them various franchises, in electing officers for their government, as a corporate body; and by other letters-patent of the same date, he, as well for the safety of his people of the town, to be enclosed with a stone wall, as of the parts adjacent, and in aid of the paving of the town, granted to them and their successors, the customs or tolls therein specified in detail, and concluded with a proviso in these words: "Provided always, that the monies arising therefrom, should be faithfully expended on the murage and pavage of the town, and not otherwise." Lord Chancellor *Hart* said, that the plain import of that language was, that the gift was made not for the exclusive benefit of the corporation, or any portion of the inhabitants, but

(*w*) *Attorney General* v. *Merchant Tailors' Company*, 7 Ves. 223; *Andrew* v. *Trinity Hall*, 9 Ves. 525.

Sir *W. Grant*, M. R. doubted whether it could be done consistently with the decree which had been made, and whether, an arrangement carrying funds given to a college in *Cambridge*, which declined the gift, to another college in *Oxford*, was an execution *cy-pres*.

for the general benefit of all the king's subjects inhabiting or resorting there for safety or commerce.

An information having been filed to compel the corporation to account for, and apply certain tolls to the public purposes, for which they were granted by the charter, *viz.* paving the streets and supporting the walls of the town, and any surplus to a charitable use *cy-pres*. The corporation alleged by their answer, that there were no walls to support, but admitted that the streets were not properly paved, and were in bad condition, and for certain reasons stated by them, they insisted on a right to apply the tolls as their own property. Lord Chancellor *Hart* was of opinion that the tolls were held in trust by the corporation, but whether it was in the Court of Chancery, or in his majesty, by sign manual, to appoint the application of any excess, he said it would be premature to determine before it should appear by the master's report that there was any excess. A reference was directed to the master to inquire whether the streets were in good repair, and if not, what sum would be required for that purpose; and it was declared, that in case it should appear upon the master's report, that there was any surplus of the money arising from the tolls, beyond the necessary expenditures for the purposes expressed in the charter, the court reserved the consideration for what purposes, and under what authority, such surplus ought to be applied (*x*).

A void legacy has been directed to be applied to the other charitable purposes mentioned in the will. Thus where a testator gave 200*l.* to the corporation of *Queen Anne's Bounty* to augment poor livings, and directed his executors to divide the residue of his personal estate into three parts, and to pay one third to some public charity, either to the corporation of *Queen Anne's Bounty*, or the society for propagating the gospel: another third to his most necessitous relations by his father's and mother's side: and the remaining third to some public charity. The legacy to the corporation of *Queen Anne's Bounty* being void, as by the

(*x*) *Attorney General* v. *Corporation of Galway*, 1 Beatty, 298; *S. C.* 1 Molloy, 95.

rules of that institution it must be laid out in land, the third of the residue which was given to the same charity, or to the society for propagating the gospel, was ordered on the same account to be paid to the latter; and the legacy of the other third, to some public charity, was declared to be good, and the executors were directed to propose a charity to the master (*y*).

A legacy given to a charitable society, which has been dissolved, will be applied *cy-pres*. Thus a testator by his will dated in June, 1819, gave a legacy of 500*l.* to a voluntary society called "The *Plymouth* and *Devonshire* asylum for the reception of Female Penitents." At the death of the testator, the asylum was in existence; but within a year afterwards, before his assets could be administered, the society was dissolved; the charitable establishment was completely broken up, and the furniture and other property belonging to it were sold. On a question whether the 500*l.* was to be applied to a charitable purpose by the crown under the sign manual, or was to be administered by the court *cy-pres*, Sir *J. Leach*, M. R. said, the testator here having marked out the particular nature of the charity to which he wished this legacy to be applied, the court will execute his intention *cy-pres;* and the master must settle a scheme having regard to the testator's will (*z*).

The doctrine of *cy-pres* will be applied in favour of any class of persons within the act of toleration (*a*). An exception was taken to the master's report, approving a scheme for the application of a charity under a will, dated 1699, bequeathing to the congregation of Presbyterians to which the testator belonged, 200*l.*, with directions to lay out the same in land, and yearly raise two several sums out of the

(*y*) *Widmore* v. *The Governors of Queen Anne's Bounty*, Ambl. 637; 1 Br. C. C. 13 n. See *ante*, pp. 51, 52, 171, 255.

(*z*) *Hayter* v. *Trego*, 5 Russ. 113. In *Corbyn* v. *French*, 4 Ves. 420, it was said, that a legacy given for the purposes of an institution which had ceased to exist before the time of payment arrived, would fail.

(*a*) *Ante*, pp. 101—105.

profits thereof, for placing out and putting apprentices two poor boys, of such as were members of the said congregation, and that lived in the parish of *St. Martin* in *New Sarum*. The fund being considerably more than adequate to the object specified by the testator, the master rejected a proposal for extending that object to other parishes, and for the foundation of a school, approving a plan for extending the charity to children of persons in the same parish of whatsoever religion.

Lord *Eldon* said, "the description of the objects of this charity, 'boys,' of such as are members of this congregation, must be taken to mean sons of such persons. This testator has strongly marked, that he did not place his confidence in the management of this trust in any persons but Presbyterians. He states himself to belong to them; he mentions the gentleman who was Presbyter; he intrusts the duty to the members of the congregation; and his primary view undoubtedly was to take such individuals, being members of that congregation, as lived in that parish: but I am satisfied, that as between the two objects of residence in that parish, and being sons of members of the congregation, he intended to give the benefit to the latter.

"This is a body known to and tolerated by the law; and it is the duty of the court, and of the crown, where the distribution is in the crown by sign manual, to distribute an unexpected surplus *cy-pres* the object to which the fund was originally given; and if there are no legal objections, or objections arising out of considerations of policy, the surplus must be applied, as near as can be, to that object which the testator meant to prefer. It would be very inconsistent with his intention to hold, that it might be applied in placing out, as objects of his bounty, children of persons of different religious persuasions; the *Roman* Catholic, the *Jewish*, or even the church of *England*; his object being children of persons professing the same religious worship that he professed.

"It has happened, that the profits of the land purchased with the fund which he destined to this purpose, amount to much more than sufficient to place out two boys. As the

property is not to go to the heir (*b*), but is to go as near as can be to the first object, sons of members of this congregation within this particular parish; if such boys cannot be found in that parish, his next object, applying the doctrine of *cy-pres*, is sons of members of that congregation, whether living in that parish or not; and if both those objects shall not be sufficient to exhaust the whole fund, the question then will be, which member of the description is to be preferred: that which speaks of boys in that parish, or that which points out sons of members of that congregation; recollecting, that he describes it as a congregation of Presbyterians; and if, according to the policy of the law as it has been acted upon, charitable institutions will be enforced in favour of persons of this description, I cannot see why the principle is not to be followed throughout in the application of the *cy-pres* doctrine.

"The consequence is, that if boys, sons of members of this congregation, cannot be found, living in this parish, or not, the application must be for boys answering that material object in the view of this testator, *viz.* sons of Presbyterians. The specification of this parish denotes a local preference. It will therefore be more proper to take boys living in the city of *Sarum;* but I see nothing to confine it. If the fund should prove so considerable that the court cannot abide by the description, taken altogether, that will not justify going to the greatest distance in the first instance; but there is nothing confining the application, if necessary to the execution of the object. I think, also, that the court would not disapprove, as an execution *cy-pres*, a provision for putting out apprentices, girls, who are the children of members of this congregation, rather than go out of it, if boys cannot be found answering both descriptions, either in that parish or in any other. But after the application to daughters of members of this congregation, before you can go to building a school, and other purposes in the scheme, you must go to boys, sons of Presbyterians out of *Sarum*."

(*b*) *Attorney General* v. *Tonna*, 2 p. 561; *ex parte Jortin*, 7 Ves Ves. jun. 1; 4 Br. C. C. 103; *ante*, 340; *post*, 615.

The scheme was directed to be reformed accordingly, without another reference to the master; by taking, 1st, boys, sons of members of the congregation within the parish: 2ndly, sons of such members in other parishes: 3rdly, daughters of members of the congregation in the same way: 4thly, sons of presbyterians generally (*c*).

2. *Where the fund is more than sufficient for the objects specified.*] When the increased revenues of a charity extend beyond the original objects, the rule as to the application of such increased revenues is, that they are not a resulting trust for the heir-at-law, but are to be applied to similar charitable purposes, and to the augmentation of the benefit of the charity.

Where the fund, which is actually exhausted by the charitable purpose declared at the time of the gift, is afterwards increased by the improved annual produce, the court always reserves the determination how the surplus is to be applied. Though the will contains no direction as to the disposition of the surplus so created, the court holds that the testator, who gave the whole value of the fund, such as it was at the time of the gift, to a charitable purpose, has divested all claims of his representatives; and the court reserves to itself the disposition of such a surplus, with the view of taking care that it shall be applied, under the control of the court, as nearly as possible to the uses and purposes to which the testator meant his property to be subservient (*d*).

Thus a testator, by a will dated Aug. 1719, gave an estate to trustees in fee, upon trust to raise yearly out of the rents the sum of 40*s*., to be laid out towards buying coats for poor men and women, within the liberty of *Walton* in *Aylesbury*, to be distributed every year amongst such of them as the trustees thought proper objects of charity; and directed his trustees to put out as apprentices the children of poor settled inhabitants of *Aylesbury* or *Walton;* and 50*s*. to be paid

(*c*) *Attorney General* v. *Wansay*, 15 Ves. 231.

(*d*) *Attorney General* v. *Coopers' Company*, 19 Ves. 189.

out of the income of his estates for defraying the expenses of the trustees' meeting; and 20*s.* a year to be paid to two of the trustees, to be appointed receivers of the rents; and directed the residue of the whole rents and profits of the premises to be employed towards placing out the said poor children; and that the said trustees should allow such sums of money, as to them should seem convenient, provided the sum so to be allowed in putting out each child apprentice should not exceed 10*l.*

On an information stating that the poor settled inhabitants of *Aylesbury* and *Walton* had found it impracticable to provide proper situations for their children, with any reputable masters or mistresses, for so low a premium as 10*l.*, and praying a farther allowance for that purpose, there being a surplus beyond what the charities declared by the will would require; the heir-at-law insisted on the proviso, and claimed the surplus of the rents and profits beyond what would be applied according to that proviso.

Sir *R. P. Arden,* M. R. thought that the testator intended the whole provision for the charities he had pointed out, but he imagined there would be objects enough to exhaust it, at the rate of 10*l.* for each apprentice fee, and therefore increased the objects until they were sufficient to exhaust the whole; and it was referred to the master, to consider what would be a proper augmentation for the apprentice fees, and the donation for clothes, and the value of the estate (*e*).

The Court of Chancery has authority to alter the trust in the distribution of the increased revenues, if it be deemed expedient so to do. A remarkable case of this kind occurred before Lord *Hardwicke.* A person had founded a charity, by giving an almshouse for five poor men; the charity establishment was greatly abused, and upon a proposal being laid before the master, he reported, that the number of poor men should be increased to ten, and that five poor women should be added, and that plan was adopted by his lordship, upon the ground that he had power, not only to in-

(*e*) *Attorney General* v. *Minshull,* 4 Ves. 11.

crease the objects of the charity, but to make an alteration in them (*f*).

Where a charity is established for two purposes, as for supporting a school and almshouses, trustees or the court have not power to augment the benefits of one part of the institution, as the increase of the salary of the master, without similar attention to the other objects. The consequence is, that if there is to be an increase of the one, there must be a contemporaneous increase of the other; but the number of persons is not to be increased, until due care has been taken for the maintenance of those already established, and when that is secured, the number of the objects may be increased (*g*).

Where a charity was established for payment of a salary to a schoolmaster, and of a yearly allowance to some of the boys upon the foundation, upon an increase of the value of the property, the salary of the master and the allowance to the boys were augmented (*h*).

Where a bequest was in trust for the poor inhabitants for several parishes named in the will, and the application was to be as the trustees thought fit, and the fund was very large in proportion to the objects, the benefit of the fund was extended to the same objects for purposes not expressly pointed out by the will. The testator among several legacies bequeathed the sum of 30,000*l.* to the bishop of *Hereford* for the time being, and other trustees, upon trust to invest that sum on government securities, and apply the interest or dividends of 11,000*l.*, part of the principal money, among such number of the poor inhabitants of the parish of *Stanton-upon-Wye*, in the county of *Hereford*, at such times, and in such proportions, and either in money, provision, physic, or clothes, as his trustees or the major part of them should think fit, for the better support and maintenance of such poor inhabitants. And the dividends, &c. of 13,000*l.*, also part of the said securities, among the poor inhabitants of

(*f*) *Anon.* cited by Lord *Eldon*, 2 Jac. & Walk. 319, 320.

(*g*) *Attorney General* v. *Coopers' Company*, 19 Ves. 190; *Attorney General* v. *Minshull*, 4 Ves. 11.

(*h*) *Ex parte Jortin*, 7 Ves. 340.

the parish of *Bredwardine*, in the county of *Hereford;* and the dividends, &c. of the remaining 6000*l.* among the poor inhabitants of the parish of *Lettor*, in the same county, with similar directions for the application of those funds. The residue of his property, the testator gave to the same trustees, upon the same charitable trusts as above mentioned, and confirmed his will by two codicils. It was insisted by B. the next of kin of the testator, that the legacy of 30,000*l.* was void; but by the decree both the trustees and B. were permitted to submit proposals to the master for a scheme (*k*).

The master having approved the proposal of the trustees, B. excepted to the report, and contended, that the court would not establish so mistaken a charity, which was in

(*k*) By the master's report it appeared, that the funds provided by the will, for the support of the poor of the above parishes, consisted of 6671*5l.* 2*s.* 9*d.* bank 3 *per cent.* consols; 603*l.* 12*s.* 8*d.* 5 *per cent.* annuities; 4024*l.* 4*s.* 4*d.* bank stock; and 2201*l.* 6*s.* 3*d.* cash. That in the parish of *Bredwardine*, the number of poor inhabitants who received alms amounted to 30; of the poor inhabitants who did not receive alms to 187; the non-resident inhabitants having legal settlements were 66; and the poor rates 185*l.* a-year. That in the parish of *Stanton*, the poor inhabitants receiving alms were 17; those not receiving alms 262; the non-resident parishioners having legal settlements, 61; and the poor rates 225*l.* That in the parish of *Lettor*, there were no poor inhabitants receiving alms; those not receiving alms, 44; the non-residents having legal settlements, 9, of whom 8 received alms; and the poor rates 85*l.* a-year. That the proposal of the trustees, calculating the income of the parish of *Bredwardine* at 100*3l. per annum*, was;—For physic and attendance to the poor, 50*l.* Clothing, bedding, and bed-clothes, 330*l.* Fuel, 135*l.* Food in the manner stated in the report, 281*l.* 6*s.* Payments for schooling, 60*l.* Payments to apprenticing poor children, 60*l.* Proportion of the salary of an agent, 25*l.* Occasional gratuities to servants and apprentices, conducting themselves well, 61*l.* 14*s.*—The proposals as to the other parishes were similar, in proportion to their difference of income. B. the next of kin, proposed that the annual sum of 1156*l.* 13*s.* 4*d.* should be apportioned among the poor of the three parishes for the purposes of the will, as being amply sufficient; and that the residue should be paid to her.

effect a premium to idleness; but if the court should be of a different opinion, then that after the specific provisions by the will were answered, there would be a large surplus, which the trustees could not dispose of according to any intention of the testator. Lord *Eldon* said, " The plan of B. is liable to many of the objections capable of being made to the other; and as to giving the surplus to her, in the present state of the record it is impossible; for such purpose cannot be said to be part of a plan for distributing in charity according to the testator's will. Her claim must be on the ground that the object aimed at is impracticable in fact, or which is the same thing, in law; and that the property being undisposed of, she is intitled as next of kin. As to the plan of the trustees, I have nothing to do with arguments of policy. If the legislature think proper to give the power of leaving property to charitable purposes, recognized by the law as such, however prejudicial, the court must administer it. If it is right to put bequests of personal property to charity under the same fetters as real estate, that is for the legislature; and courts of justice must act without regard to the impolicy of the law. It cannot be supposed that this testator was unacquainted with the state of these parishes, the will being made only three years before his death: if he had been asked, as to the particular mode of executing his plan, he would probably have been under as much difficulty as the court is. In two codicils he confirms the disposition made by the will. If this can be carried into effect practically in point of law, there is so little objection, that the court is bound to give it effect. The testator certainly thought so. If that is founded in error, B. would have more to do, to get at the surplus, than to say it could not be practically applied. She must contend that the application to charity must be precisely as it is given by this will: a point certainly not settled, and that could not be settled upon these exceptions. If her claim was grounded, not upon the impracticability, but upon the impolicy of the object, there will be much more difficulty, before she gets rid of the *cy-pres* doctrine; upon

many of the cases, particularly *De Costa* v. *De Pas*(*l*), which lately I had occasion to refer to, imputing to the testator a general intention of embalming his memory, as Lord Chief Justice *Wilmot* says (*m*). Upon either head, therefore, it is open to serious argument, whether she can take it. The master's report by no means satisfies me that no plan can be devised which ought to be carried into execution. With a very small variation of phrase, this report itself would give such a plan; and the doubt I have at last is, whether it be fit for the court to do that in an indirect way by sending it back to the master, or to say, that, by fair reasoning, what the master has now proposed is consistent with the intention of the testator, however shortly expressed in the will. As to the time and proportions he has altogether confided in his trustees, subject to the exercise of a sound discretion to be exercised by this court: not as to the manner, for that is prescribed by him. I construe it 'poor inhabitants not receiving alms.' If the word '*money*' alone had been in the will, it could not be said that you could give the money to the poor inhabitant, enabling him to purchase fuel, provisions, and clothes, and that it is misapplied if the trustees procured those necessaries, and with his consent paid for them. It would be strong to make that distinction. The words 'provision, physic, and clothes,' might therefore have been left out of the will. I look upon them rather as designating to the trustees how they were to apply the money, than as actually necessary. It is impossible for me to object to the medicines: the testator having expressly said, money laid out in physic would be a good application, and 50*l.* a-year is very little for so many poor families. As to fuel, if the report proposed to advance money for that purpose, it would be directly within the words, and the court will not disapprove it, if the purposes of the will are secured by the plan. There is no weight, therefore, in that objection to the plan, merely because it does not give the money

(*l*) 7 Ves. 76; *ante*, p. 106. (*m*) Wilmot's Notes, 32; *ante*, p. 274.

for that purpose. Then clothes and provisions are expressly within the will. As to the last sums in the report, I agree, that the money is proposed to be disposed of in a more useful way than any other. The question is, whether in the fair sense of this will, if money be given to a schoolmaster, to teach a poor boy reading and writing, that is an abuse of the charity, or an advance of money within the intent and meaning of the will. It is very erroneous to say, that, which may tend to make it unnecessary to advance to that boy or his parents, money, provision, or clothes, in future, was advanced contrary to the will, the advance being made to the intent, that he should have that education which would enable him to get his own bread and maintain his parents. But B. the next of kin, has no interest in that question; for if that would be wrong, it might be divided among the others, so as to disappoint her. Next, as to apprenticing: Suppose the master for a small fee covenants to maintain the boy: would it be contrary to the fair exposition of such a will to advance that money to that person, to relieve the trust from an application from time to time according to the trust? If the money were given to the boy himself, and he was to pay it as an apprentice fee, that would be within the will; and the only alteration of the report would be in that respect; and I will not send it back to the master for that. The best plan perhaps would be, to apply, according to their own notions, from time to time, laying their account of it annually before the master: but I cannot lay trustees under those difficulties. Unless, therefore, B. can lay before the court a plan, under which she can contend for a distribution of the property as to part of it upon this principle, that the testator has not given it away, she is not very usefully for herself or the charity contending, whether a payment of money for the benefit of a poor person is within the strict letter of this will, a payment to that poor person. It is best, therefore, upon the whole to confirm the report, declaring that I do it, conceiving the plan therein contained agreeable to the true construction of the testator's will" (*n*).

(*n*) *Bishop of Hereford* v. *Adams*, 7 Ves. 334.

So where the testator gave all the residue of his personal estate to trustees, to place out at interest, and to pay 12*l.* *per annum* to a proper schoolmaster for instructing all the children of R., and to pay 20*l.* yearly to buy books for the school, and to apply the surplus, *if any*, in clothing and putting out apprentices, *two* children from R. and *one* from W. The personal estate being of a much greater amount than was sufficient to answer the charities, the next of kin claimed the surplus. On their behalf it was said, suppose the fund had amounted to some very considerable sum, the court would not then be at liberty to expend the whole in apprentice fees; as the objects of the testator's bounty were limited to *three*, it must then go to the next of kin. But Sir *R. P. Arden*, M. R., after observing that the intention of the testator was clear to give the whole surplus, said, that in the *Attorney General* v. *Bishop of Oxford* (*o*), the only object the testator had in view was, the building of a church, and *nothing short of that* could answer his intention, and therefore the object must be effected *in toto* if at all; but that, wherever the intention had been to dispose of the whole property to certain purposes, as in the *Thetford school* case (*p*), and numerous other cases, there the whole had been applied, and it had only been inferred, that the testator had been mistaken merely as to the *quantum*. It had been observed, that by giving the apprentice fees to three objects, the testator had marked out the limits of his bounty; but his honour said, that *according to the disposition of the residue*, the intention could not be confined to three boys; and if it would pay more, the testator had shown an intent that the surplus must be applied in the same manner; therefore he was of opinion, that it must be applied to the charitable purposes mentioned in the will. Perhaps, he added, it might not turn out to be much more than sufficient; but if it should, the next of kin might apply to the court, as in other cases, where there had been an increase of rents and profits. The surplus was declared to be applicable to the charitable

(*o*) 1 Br. C. C. 444 n.; *post*. (*p*) *Ante*, pp. 545, 546.

purposes mentioned in the will, and a scheme was directed to be laid before the master for the application of the charitable funds given by the will (*q*).

Lord *Eldon* held, where the master and usher of a free grammar-school were corporators under a royal foundation, that as long as they continued so, and until they were removed by the visitor, a court of justice must give them the enjoyment of all the revenues belonging to them by the instrument of foundation, giving them the corporate character(*r*).

It was said by Sir *John Leach*, M. R. to be the settled principle of the Court of Chancery in the administration of charity property, given not for the purposes of individual benefit but for the performance of duties, that if the revenues happen to increase so as to exceed a reasonable compensation for the duties, the surplus must be applied to other charitable purposes, and the master will be directed to settle a scheme for that purpose.

By letters-patent, dated 5th of July, in the 4th and 5th years of the reign of Philip & Mary, license was granted to *Anthony Browne*, then a serjeant-at-law, and afterwards one of the judges of the Court of Common Pleas, and to *Joan*, his wife, and the heirs and executors of *A. Browne*, to found and endow a grammar-school in the parish of *Brentwood*, with lands of the annual value of 36*l.*, to consist of a master and two wardens, who were thereby made a body corporate, and which school was to be for the inhabitants of *Southweald*, and was to be regulated according to certain orders and constitutions, to be made by the said *A. Browne* or his executors; and by an indenture of feoffment, made in the following year, certain lands were granted by *A. Browne* for the maintenance of the school. *A. Browne* made his will on the 28th of December, 1565, and after reciting the grant of lands which he had made to the school, but that he had

(*q*) *Attorney General* v. *Earl of Winchelsea*, 3 Br. C. C. 373; *S. C.* 2 Cox, 364, *nom. Attorney General* v. *Hurst*.

(*r*) *Ex parte Berkhampstead Free School*, 2 Ves. & B. 144; *Attorney General* v. *Hartley*, 2 Jac. & Walk. 371.

appointed no convenient place for the habitation of the schoolmaster, he thereby devised to the master and wardens of the school a certain messuage and lands for that purpose; and by his will he also devised to the master and wardens of the school his parsonage of *Dagenham*, which he had demised to *John Lyttell* for 20 years, at a rent of 25*l.* and the tenement, to the intent that, with the issues and profits thereof, the master and wardens should find five poor folks in *Southweald*, to be named by him during his life, and after his death by his wife, and after her death by one *Dorothy Huddlestone* during her life, and after her death by the owners of the manor of *Southweald*. Sir *A. Browne* died without issue, leaving *Wystan Browne* his heir-at-law; and on the 3rd of May, in the 12th year of Queen Elizabeth, a suit was instituted in the Court of Chancery by certain inhabitants of *Southweald* against *W. Browne*, who appears to have disputed the grant and devises made by Sir *A. Browne*, as well with regard to the school as to the five poor folks, for the purpose of establishing such grant and devise; and in the result of that suit, although *W. Browne* at first made a hostile defence, it was ordered that he should execute a conveyance according to the founder's intent; and the decree adjudged that such conveyance should be executed by *W. Browne* for the maintenance of the said schoolmaster and poor people, according to the good meaning of the said Sir *A. Browne*; and no statutes or ordinances having been made by Sir *A. Browne* or his executors, it was ordered, with the assent of the parties, that statutes and ordinances for the said school and poor people should be made by the Bishop of *London* and Dean of *St. Paul's*, or their successors, and *W. Browne* or his heirs.

It appeared that no statutes or ordinances for the regulation of the school and poor people were made until the year 1622, being 52 years after the decree; but, on the 18th July in that year, certain statutes and ordinances were made by the Bishop of *London* and the Dean of *St. Paul's*, and one Sir *A. Browne*, described as the heir of the founder, but who was, in fact, not his heir general, but his heir male only. By the 47th of these statutes it is declared, that the schoolmaster discharging all

duties wherewith he is charged, shall retain in his own hands to his own use, for his pains in teaching or otherwise, all the rents and profits which shall be made of the lands, tenements, and hereditaments of the said corporation, other than such as were, by the said constitutions, otherwise limited and appointed; and by certain following articles, provision was made for five almshouses and for certain annual payments for the five poor folks who were to inhabit them.

The letters-patent of Philip & Mary seem to have confined the benefit of the school to the parish of *Southweald*; but, by the statutes, the schoolmaster was to receive any scholar offered to him out of that parish or out of any other parish within three miles of the schoolhouse. The income of the lands given for the use of the school by Sir *A. Browne*, and mentioned in the indenture of feoffment and will were stated, in the answer of the defendant, to amount to 325*l.* a-year, besides the house intended for the schoolmaster; and the income of the land and premises given by the will to provide for the five poor folk, was admitted to amount to about 1000*l.* a-year; but it was said that the rent of the school lands had since much decreased.

At some time before 1803, the stipends of the almsfolk were increased from 40*s.* to 4*l.* 3*s.* 6*d.* each; and in 1803, their stipends were further increased, and remained at the sum of 10*l.* each; and in all time subsequent to the making of the statutes and ordinances before mentioned, the schoolmaster had received to his own use the whole income and profit of the lands and premises mentioned and comprised in the grant and devise of Sir *A. Browne*, after paying the ushers employed in the school, and paying the stipends to the almsfolk.

The defendant, who was the son of the patron of the school, did not perform the regular duty of schoolmaster, but provided and paid ushers. The net revenue of the schoolmaster, after paying his ushers and the almsfolk, at the time of the institution of the suit was about 1000*l.*, and the office of schoolmaster had uniformly been considered as a valuable piece of preferment in the gift of the patron. The three parishes to

which the advantage of the school was limited by the statutes, did not usually furnish, altogether, more than six or seven boys desirous to take advantage of a grammar-school, and for many years the scholars were limited to that number; but afterwards, when instruction was given in reading, writing, and arithmetic, the number of scholars had been increased to 100 and upwards, but that practice was afterwards discontinued, in consequence of an opinion expressed by the commissioners of charities (*s*), that it was not consistent with the intention of the letters-patent.

The object of the information was, to exclude the schoolmaster from any part of the income arising from the parsonage of *Dagenham*, which was intended by the will of Sir *A. Browne* as a provision for the almsfolk only, and to have a scheme settled by the master for the future administration of both charities. Sir *J. Leach*, M. R., said, The important question in the cause was, whether the statutes and ordinances made in 1622, gave to the schoolmaster for the time being, an unimpeachable right to receive for his personal benefit, without reference to the duties of the office, the very large income which he then enjoyed, and which might be termed a sinecure income. His honour was of opinion that the conveyance made by *Wystan Browne*, under the aforesaid decree of the Court of Chancery, being expressly for the maintenance of the schoolmaster and poor people, according to the good meaning of Sir *A. Browne*, the authority given by the decree to make statutes and ordinances, did not authorise the making of any statutes or ordinances contrary to the intention of Sir *A. Browne*; and that the same conclusion would follow, even if that decree could be construed as substantially a grant from *Wystan Browne*; his honour being of opinion, that it was contrary to the clear expressed intention of Sir *A. Browne*, that any part of the revenues of the property given for the maintenance of five poor folks, should be applied for the benefit

(*s*) 11th Report of Commissioners of Charities, 203—216, 801—810. See 3rd Rep. June, 1818, of Committee of House of Commons on the education of lower orders, 160—172.

of the schoolmaster; and further, that if the statutes and ordinances in question could be considered as having full force, they would not protect the schoolmaster in the enjoyment of his present large sinecure income. By those statutes, the rents and profits which he was permitted to retain to his own use, were expressly given to him for his pains in teaching, and otherwise performing his duties as a priest; and it is a settled principle of the Court of Chancery, in the administration of charity property, given not for purposes of individual benefit but for the performance of duties, that if the revenues happen to increase so as to exceed a reasonable compensation for the duties, the surplus must be applied to other charitable purposes. His Honour thought, that if the proper revenue of the school should not appear adequate to support such a school as might be usefully established at *Brentwood*, that the master to whom the matter would be referred, would be justified in recommending aid to the school from the income of the *Dagenham* rectory and lands, and that the school was not necessarily to be confined to a grammar-school. By the decree, it was referred to the master to inquire what property belonged to the said charities, and to approve of a proper scheme for the application of the present revenues; the court reserving to itself the consideration, whether, for the purposes of the scheme which should be adopted, it would be necessary or not to apply for the aid of parliament (*t*).

Where lands are given to the use of a parish church, and there is a surplus fund, after providing for the repairs of the church, the application of such surplus by the churchwardens in aid of the parish-rates, levied for the support of the poor and other parochial purposes, although it may eventually be considered as a proper mode of applying the fund for the

(*t*) *Attorney General* v. *The Master of Brentwood School*, 1 Mylne & Keen, 376—395.

On the 27th June and 1st July, 1834, an appeal against the judgment of the master of the rolls was heard before Lord Chancellor *Brougham*, but his judgment was postponed to allow an opportunity for negociating a final settlement, to be confirmed, if necessary, by parliament.

benefit of the poor, yet, viewed in its direct tendency, is not a proper mode of administering the surplus; and the court, in such a case, will direct the master to approve a scheme (*u*).

Where lands were given to a corporation in the reign of Henry VIII. (*v*), for the aid and relief of the poor citizens and inhabitants of *Exeter*, who were heavily burthened by fee-farm rents and other impositions and talliages, it was held not to be a due administration of the fund to apply the rents to the payment of fee-farm rents due from the city, repairing the gaol, and other public purposes, but that such rents ought to be applied to the relief only of such poor inhabitants as did not receive parochial relief.

On an information being filed, which complained of the misapplication of the rents of the estate, the corporation, in their answer, alleged that at the time when the grant was made, there were annually payable by the city of *Exeter* two fee-farm rents, one to the crown, and another to the Convent of Holy Trinity, in *London*; and that they and their predecessors had applied the rents and profits of the estate,

(*u*) *Attorney General* v. *Virian*, 1 Russ. 228.

(*v*) An estate in the county of *Devon* was conveyed to the mayor, bailiffs, and commonalty of the city of *Exeter*, and their successors for ever, "in subsidium et relevamen inopie pauperum civium et inhabitantium civitatis predicte, qui multociens graviter onerati existunt, tam per feodi firmas ejusdem civitatis Domino Regi et aliis annuatim persolvendas, quam per alias impositiones et tallagia dicti Domini Regis, cum per totum regnum Anglie currere contigerit, et ad inveniendum quendam idoneum capellanum annuatim Divina celebraturum in capella Sancti Georgii, in civitate predictâ." The relators and the defendants did not agree in their translation of the first words. In the information they were translated, "to the aid and relief from want of poor citizens and inhabitants of his majesty's aforesaid city, who were grievously burthened, as well by fee-farms of the same to his majesty and others payable, as by other imposts and taxes to his majesty, where such were imposed throughout the realm of *England*." In the answer they were translated "in aid and relief of the want of poor citizens and inhabitants of *Exeter*, who very often were grievously burthened, as well by the fee-farms of the city payable to our lord the king, and to others yearly, as by the impositions and taxes of our said lord the king when he shall happen to make his progress through his whole kingdom of *England*."

as far as they would extend, towards the payment of such fee-farm rents, the support and maintenance of the prisoners confined in the city gaol, the cost of repairing the building, the payment of the salary of the keeper, and the expenses of entertaining the judges at the assizes. They insisted that in so doing they had fulfilled the objects of the grant, inasmuch as the fee-farm rents were expressly mentioned in the deed, and the application of the fund to the other public purposes stated in the answer, was in aid and relief of the poor citizens and inhabitants, who would otherwise have been subject to the payment of those expenses by means of a county rate or other public assessment.

By the decree of the vice chancellor, it was declared that the rents were applicable in aid and relief of such poor citizens and inhabitants as did not receive parish relief (*w*); but Lord *Eldon*, on appeal, called in question the rule that a fund given for the relief of the poor is to be distributed to such only as do not receive parish relief; and saw no reason why something out of the funds of a charity should not be added to the pittance derived from the rates. His lordship said, "There may be many cases in which there cannot be a more prudent application of a charity fund than by giving it to those who are receiving parish relief; not thereby exonerating the rich from contributing to the relief of the poor, but adding to the relief, which the law has provided, further relief, which the rich are not bound to afford. There are many charities which are applied to the relief of persons who receive parochial aid; and if it is to be laid down that a grant for the benefit of poor citizens and inhabitants is not to be administered so as to afford aid to persons chargeable to the parish, I cannot tell how many charities will be disturbed and thrown into confusion" (*x*).

Lord *Lyndhurst*, before whom the case was re-argued, held that the application of the charity funds to the payment of public expenses did not fulfil the intention of the donor: for

(*w*) *Attorney General* v. *Corporation of Exeter*, 2 Russ. 45.

(*x*) *S. C.* 2 Russ. 51—54.

the estate was not given for those purposes, but to relieve the wants of the poor; for although the poor were described as greatly oppressed by those charges and impositions, yet the payment of them, except so far as they fell upon the poor, could not be considered as a fulfilment of the object of the charity, which was intended exclusively for the poor, and not to be shared by or applied for the benefit of the rich. It was therefore held that the application should be according to the vice chancellor's decree: for if the rents were applied in paying such expenses as would fall upon the county rate, or be defrayed by any other public tax or contribution, they would go in aid of the rich as well as the poor, and in a much larger proportion in favour of the former than of the latter. If they were given in support of the poor who received parish relief, they would, in like manner, be applied in aid of the rich. It was therefore thought that the best mode of administering that portion of the fund which was applicable to the poor, so as to give effect to the founder's intention, would be to employ it in aid of the poor citizens and inhabitants of *Exeter* not receiving parish relief; and although such an appropriation might have the effect of preventing some individuals from applying for relief, who, without such assistance, might be under the necessity of doing so, and so, indirectly, the benefit of the fund might be shared in a degree by the rich, yet that was a contingent effect which could not be avoided (*y*).

So where the rents of lands were given for the relief of the poor of the parish of *St. Clements*, in the suburbs of the city of *Oxford*, it was declared that such rents ought to be applied to the relief of poor inhabitants of that parish not receiving parochial relief (*z*).

Under a trust enabling trustees to apply funds for the relief of the poor, the trustees may apply part of the funds for the instruction of the poor of the parish. By deed

(*y*) *Attorney General* v. *Corporation of Exeter*, 3 Russ. 395.

(*z*) *Attorney General* v. *Gutch*, Reg. lib. A. 1830, fol. 2720.

dated 12 Henry VI., divers messuages, lands, and hereditaments in *Willoughby*, and other places in the county of *Warwick*, were conveyed to trustees and their heirs, "upon trust to apply the yearly issues and profits thereof, from time to time, towards the repairs of the church of *Willoughby* aforesaid, the payment of the fifteenths, and relief of the poor in *Willoughby*, buying of armour and setting forth soldiers, mending of causeways and highways in *Willoughby*, and repairing *Sawbridge* bridge, in the parish of *Willoughby* aforesaid."

A school-house having been built, Lord *Lyndhurst*, C. B. held, that the application of part of the funds to the instruction of the children at such school, came within the terms of the trust; for where trustees are appointed to apply funds for the relief of the poor of a parish, they may, in the exercise of their discretion, apply those funds, or part of them, for the education of the poor children of the parish; that being an application of the funds for the relief of the poor, within the language of an instrument of the above description (*a*).

Generally speaking, gifts for the use of the poor are not gifts in aid of the poor rates; because, as has been said (*b*), gifts in aid of the poor rates would be for the benefit of the rich, and not of the poor; but where it appeared, that a particular town had not taken the benefit of the stat. 43 Eliz. c. 2, nor raised poor rates until 1729, it was held under conveyances of lands in 1653, for erecting and providing a house of correction, within the borough of *Berwick*, and for the better maintaining, providing for, and disposing of the poor therein for ever, and all other sturdy and idle persons coming and being therein, and for setting them at work, that such gifts were a substitution for poor rates, and the court declared that the gifts were in aid of the poor rates (*c*).

3. *Of the application of the doctrine of cy-pres to the regulation of grammar-schools.*] The nature of a charity can

(*a*) *Wilkinson* v. *Malin*, 2 Cromp. & Jerv. 644, 654, 655.

(*b*) *Ante*, pp. 61, 62, 628.

(*c*) *Attorney General* v. *Corporation of Berwick-upon-Tweed*, Taml. 239.

be changed by an application to objects different from those intended by the founder, only where it is clear, that by a strict adherence to his plan, his general object will be defeated, not upon the notion of an advantage to the inhabitants of the place where the charity is established.

There have been many cases in which, when the particular things prescribed as to charities cannot be executed, a change has been made by carrying them into effect as nearly as possible, which has been sanctioned by the court; but if the original trusts are as capable of being performed at this day as at the time of their original creation, the Court of Chancery has no jurisdiction to alter them. And, therefore, where the person holding the great seal finds a free grammar-school established, even if he were convinced that such a school could be of no or of little use, yet he would be bound to carry on the foundation, as the author of it meant it should be administered; and the court has no power to alter such foundation, with a view to any superior benefit which might arise from an institution of a different nature (*d*).

The trustees cannot of their own authority, apply property *cy-pres*, but they must obtain the sanction of the Court of Chancery; and therefore if a grammar-school is not beneficial, they cannot apply the revenues of the school for other purposes (*e*).

By a grammar-school is meant, a school for education in the learned languages (*f*). Where a free grammar-school is instituted, it does not mean a school for teaching merely reading and writing, but it is to be a school for grammar in this sense, that boys are to be taught those languages which are taught in almost all of what are called grammar-schools in this kingdom. It was a great part of the policy of the

(*d*) *Attorney General* v. *the Earl of Mansfield*, 2 Russ. 514, 520.

(*e*) *Attorney General* v. *Hartley*, 2 Jac. & Walk. 371, 372.

(*f*) *Attorney General* v. *Whiteley*, 11 Ves. 241; *Attorney General* v. *Dean and Canons of Christ Church*, Jac. Rep. 484.

Lord *Eldon*, in 11 Ves. 250, adopted Dr. *Johnson's* definition of a grammar-school, *viz.* "A school in which the learned languages are grammatically taught."—Dict.

times of Edward VI. and Elizabeth, to institute grammar-schools over almost the whole kingdom (*g*).

It is said in *Duke* (*h*), that "if the gift be general, for the maintenance of a school, and the decree be made for a grammar-school, the lord chancellor may alter the decree and appoint it for a writing school." But where several donations, partly for the support of a school, and partly for the support of a *grammar-school*, had been devoted by the commissioners of charitable uses, in 1628, to the maintenance of a grammar-school, and that decree had been since followed, Lord *Eldon* decided, that the whole revenues must be applied to the use of the grammar-school, and that neither reading nor writing was to be introduced, at least during the continuance of the then master; but the decree was made without prejudice to what might be fit to be ordered for the maintenance of any other school at *Bingley*, by competent authority, after the then head master should cease to be such master, with respect to revenues not absolutely appropriated, by the grants thereof, to the maintenance of a grammar-school, but consistently therewith applicable to the maintenance of any other distinct school (*i*).

The free grammar-school at *Leeds*, having been uniformly conducted as an institution for the education of boys in the elements of classical learning; in order to render the institution serviceable for the purposes of commercial education, by the introduction of masters qualified for such instruction, an information was filed. In 1797, a decree was made, referring it to the master to inquire what estates were derived under the respective donations to the charity, and whether it would be for the benefit of the charity to have any other masters to teach writing, arithmetic, and other languages besides the *Greek* and *Latin*; and it was ordered that the master should consider a proper scheme for carrying the charity into execution. The master found that

(*g*) *Attorney General* v. *the Earl of Mansfield*, 2 Russ. 521.

(*h*) Page 169 (170). See 2 Jac. & Walk. 370.

(*i*) *Attorney General* v. *Hartley*, 2 Jac. & Walk. 353, 385.

the several gifts were for the benefit of the free grammar-school; and that after a sufficient maintenance was provided for the then schoolmaster and usher, there would be a surplus arising from the funds of the charity, which might be usefully applied in salaries of such additional masters as might be employed in the proposed extended plan of education and that it would be proper to have masters appointed for the above purposes; and certified his approbation of adding to the establishment, one *German* master and one *French* master, and a master for teaching algebra and the mathematics. An exception having been taken to the master's report by the defendant, on the ground that the school was intended for a free grammar-school only, and that it did not appear that the person who endowed the school intended that more than one master and one usher should be appointed and endowed, Lord *Eldon* declared, that the school in question was for teaching grammatically the learned languages, and directed the master to review his report, as to any plan the parties might think proper to lay before him, for the benefit of the charity, such as it was thereby declared to be, with the view to the consideration whether any arrangement as to the management of the salaries and gratuities to the masters, might, upon the whole, be proper for promoting the charity. Lord *Eldon* asked what right the Court of Chancery had to alter the establishment of the charity by the instruments of foundation; and observed, "Without going the length of saying, the court has no such right, if a case should arise in which the application of the whole fund would destroy the charitable purpose, in order to preserve that purpose, yet upon all the authorities, to warrant the court in assuming that power, the case must be very clear; and the alteration of the nature of a charity is a proposition as serious as can be offered to the judgment of the court.

"The question is, not what are the qualifications most suitable to the rising generation of the place where the charitable foundation subsists, but what are the qualifications intended. If upon the instruments of donation, the charity intended was for the purpose of carrying on free teaching in

what is called a free grammar-school, I am not aware, nor can I recollect from any case, what authority this court has to say, the conversion of that institution, by filling a school, intended for that mode of education, with scholars learning the *German* and *French* languages, mathematics, and any thing except *Greek* and *Latin*, is within the power of this court. The proposition is quite different, where the directions prayed are founded in a purpose to promote the direct object of the charity; and where boys are to go to this school who are not to learn *Greek* and *Latin*, but are to have a particular part of the school set apart, and the funds applied for a different purpose from that intended by the donors, which may be very useful to the rising generation of *Leeds*, but cannot possibly be represented as useful to this charity. The difficulty is insuperable" (*k*).

So where a testator, in 1732, devised a freehold estate to the dean and canons of *Christ Church, Oxford*, and their successors for ever, "in trust that the said dean and canons, and their successors, should constitute and support a grammar-school in the borough of *Portsmouth*, in the county of *Southampton*, in manner following; (that is to say,) that they the said dean and canons, and their successors, shall appoint a master and usher to the said school, and pay unto the said master yearly, and every year, the sum of 50*l.*, and to the said usher the sum of 30*l.* of lawful money of Great Britain. And I do hereby order, that the said dean and canons shall, from time to time, order and direct the management of the school."

On an information filed for the purpose of establishing the

(*k*) *Attorney General* v. *Whiteley*, 11 Ves. 241—252. See 15 Rep. of Commissioners of Charities, p. 663, by which it appears that no further proceedings were taken in the suit, and that since the death of the late master, *Wm. Whiteley*, the committee managing the school, have made some new regulations for the government of the school, the salaries of the master and usher, and for giving the scholars, in addition to classical learning, the benefit of instruction, by the master and usher, in the elementary parts of the mathematics.

charity, the dean and canons, in their answer, stated that they had about the year 1750 built a school-house, and had applied the rents to the maintenance of a master and usher, whose salaries they had increased to 80*l.* and 60*l.*, in consequence of an improvement in the value of the property; they contended that it was not the intention of the testator to have a free grammar-school established, but that he intended that there should be a school for the advantage of the town, by having proper persons to act as master and usher, and that the scholars were to be educated, as they had hitherto been, at the expense of their parents and friends. It was held that the testator, by directing the erection of a grammar-school, meant a free grammar-school for education in the learned languages. And the founder having provided means for procuring persons to give such instruction, though there were no words imputing gratuitous education, the court considered that by necessary implication, it must have been intended to be free to the inhabitants of the town to a certain extent, although the trustees had been acting on a contrary supposition from the time the school was founded (*l*).

By letters-patent, dated 6th of April, in the 7th year of Queen Elizabeth, reciting that *Roger Cholmeley*, knight, had petitioned, that in the town or hamlet of *Highgate*, a grammar-school for the good education and instruction of the boys and young men in that place, and the neighbourhood adjoining, might be erected, founded, and established; and also that he might be enabled, in any other convenient manner, to provide for the relief and support of certain poor in the said town or hamlet, her majesty ordained, that, for the future, there should be one grammar-school in *Highgate*, which should be called, "The free grammar-school of *Roger Cholmeley*, knight," for the perpetual education, bringing up, and instruction of boys and young men in the knowledge of grammar. Six persons were constituted a body corporate, by the name of "The wardens and governors of the possessions, revenues, and goods of the free grammar-school of

(*l*) *Attorney General* v. *the Dean and Canons of Christ Church*, Jac. Rep. 474.

Sir *Roger Cholmeley* in *Highgate;*" and they and their successors were empowered to take and hold lands for the support and maintenance of the school, and the relief of the poor of *Highgate.*

One of the statutes made for the government of the school, ordered, according to the will and intent of the said Sir *R. Cholmeley*, founder of the school, "that there be an honest and learned schoolmaster appointed and placed to teach the scholars coming to this free school, which schoolmaster that shall be placed be graduate of good sober and honest conversation, and no light person, who shall teach and instruct young children as well in their A B C, and other English books, and to write, and also in their grammar, as they shall grow ripe thereto; and that without taking any money or other reward for the same than is hereinafter expressed and declared."

Lord *Eldon* held, notwithstanding the peculiarity in the statutes as to reading and writing, it appeared tolerably clear, taking the whole together, that the intention of the founder was to establish a free grammar-school for liberal education; and that according to the phrase *free grammar-school*, and attending to what were to be the qualifications of the person who was to conduct the school, it was to be carried on in such a manner as at least to afford an opportunity to the specified number of boys of being taught, not merely the *English* grammar, but the elements of the learned languages (*m*).

Notwithstanding the preceding cases, it has been since held that the court has jurisdiction to extend the application of the surplus income of property, given for the support of grammar schools, beyond the mere literally expressed intention of the donor, provided such income be applied to subjects connected with that intention.

A school was established by the charter of the crown, by which it was ordained, "That in future, for ever, there should be in the town of *Monmouth* an almshouse for poor people, and *one free grammar-school* for the instruction and

(*m*) *Attorney General* v. *the Earl of Mansfield*, 2 Russ. 501.

education of boys and youths in the Latin tongue and other more polite literature and erudition, and that the said school should thenceforth for ever be called 'The free grammar-school of *William Jones* in *Monmouth*,' and should consist of one schoolmaster and one under-master." The same instrument established a lectureship, and appointed the master and four wardens of the *Haberdashers' Company*, and their successors, governors of the possessions, revenues, and goods of the almshouse and free grammar-school of *W. Jones*, in *Monmouth*, constituting them for that purpose a body corporate, and investing them with the usual powers; and it ordained that all issues and revenues of lands to be given and assigned for the maintenance of the almshouse, school, and preacher, should be expended in the maintenance of the poor people of the almshouse, of the master and under-master of the school, and of the preacher, and in repair of the lands and possessions of the charity.

The master in chancery to whom the matter was referred, stated that he was of opinion that a portion of the funds of the charity could be applied in making the addition aftermentioned to the existing establishment, without diminishing the salaries and allowances already payable thereout, and after reserving a sufficient fund for repairs and other contingencies; and that the school belonging to the charity as a free grammar-school, would be rendered more extensively useful in the manner and for the purposes intended by the founder, by adding to the present establishment some provision for the instruction of the boys educated at the school in writing and arithmetic. And he was also of opinion that a competent and respectable person should forthwith, and from time to time, be appointed by the defendants, for the purpose of teaching the boys belonging to the charity school writing and arithmetic for two hours in each day, *viz.* one hour in the morning and one hour in the afternoon; that the annual sum of 60*l.* should be allowed such person for his care and pains in such instruction, and that the same should be paid out of the dividends arising from the sum of 6571*l.* 19*s.* 3*d.* 3 *per cent.* consols., the amount of the accu-

mulations of the charity fund. This report was confirmed by the court (*n*).

In another case, an information had been filed for the purpose of executing the trusts of the will of a testator for the establishment of a grammar-school at *Market Bosworth*. The income of the school having greatly increased, it was referred to the master, on the petition (*o*) of the governors of the school to

(*n*) *Attorney General* v. *The Haberdashers' Company*, 3 Russ. 530. See 1 Mylne & Keen, 377, 378.

(*o*) The petition stated, that the inhabitants of *Bosworth* and *Cadeby* being, with few exceptions, in humble circumstances, had neither pecuniary means nor local opportunities of procuring for their children such instruction in *English*, writing, and arithmetic, as might qualify them for entering with advantage upon the study of the learned languages; that the original founder of the charity did not, by his will, confine the objects of the school to instruction in the learned languages, but seemed to have intended to further education generally; that the statutes of the school seemed to contemplate the extension of the scheme of education, which was to be given in it to other branches of knowledge besides the learned languages, one of the statutes having provided that "in the first form of the lower school shall be taught the A B C, the Primer, Testament, and other *English* books;" that in former times there had been a writing-master attached to the establishment, as well as a master and usher; and that unless a good and effective plan of education in *English*, writing, and arithmetic, formed a part of the scheme for the administration of the charity, there would not be a succession of scholars qualified for prosecuting the study of *Latin* and *Greek*, and the school would become ineffectual as a place of instruction in the learned languages, as well as useless to that district, for the education of youth within which it was intended by the founder. The prayer of the petition was, that, in the scheme for the future administration of the charity, provision might be made for instructing the boys in *English*, writing, and arithmetic. Lord *Eldon* referred it to the master to inquire how far any provision for such instruction of the children of the two parishes mentioned would be consistent with the due execution of the charity as founded by the testator. The scheme approved by the master, and confirmed by the court, provided that there should be an usher, whose sole occupation should be to instruct the scholars in *English*, writing, and arithmetic, from the most elementary of such branches of education upwards, and who should receive out of the school funds a salary of 70*l.* a-year, besides 20*l.* for a house; and that in allotting the hours of attendance in school, care should be taken to

settle a scheme for the future application of the income of the charity estate; and it appearing that it would be greatly for the benefit of the inhabitants of *Market Bosworth*, that the scheme of education should be extended beyond the purposes of a mere grammar-school, the decree directed that the scheme to be settled by the master should not be confined to instruction in the learned languages, but should comprise other general branches of education. The master settled the scheme accordingly, which was confirmed by the court, and had been acted upon for several years. It appeared afterwards, that after defraying all expenses of the scheme so settled by the master, there remained from the income of the charity school, a clear yearly sum of 500*l.*, and the question submitted by the attorney general to the court, was, as to the application of that sum. Sir *J. Leach*, M. R. said, "The court appeared to have full jurisdiction to extend the application of the income of charity property, beyond the mere literally expressed intention of the testator, provided the income be applied to subjects connected with that intention." It was therefore referred to the master to consider of a further scheme for the application of the income of the charity estate, having regard to the testator's will, the former scheme, and other subjects connected with that scheme (*q*).

In the *Attorney General* v. *Earl of Mansfield* (*r*), it appeared that a chapel had been granted to the trustees of the school for the maintenance of the school, and the inhabitants of the hamlet, in which the school was, had been long accustomed to attend the performance of divine worship there; it having been held, with reference to the details of the history of the chapel and the particular language of the instruments, that the chapel was not in the nature of a chapel

give the boys, who were prosecuting the study of the learned languages, opportunity to have the benefit of the instruction thus provided in *English*, writing, and arithmetic. *Attorney General* v. *Dixie*, 3 Russ. 534—537 n.

(*p*) *S. C.* 2 Mylne & Keen, 342. See *Attorney General* v. *Master of Brentwood School*, 1 Mylne & Keen, 395; *ante*, p. 626.

(*r*) 2 Russ. 501; *ante*, p. 635.

of ease for the accommodation of the hamlet, but belonged to the school, the court decided that the trustees of the school had no right to apply the revenues of the charity in enlarging the chapel for the accommodation of the inhabitants of the hamlet.

Trustees, who are directed by the gift to apply the income of an estate towards the necessary finding a schoolmaster, and for the pains of such master, may expend part of the rents in rebuilding and repairing the school-room and school-house (*s*).

The court will sometimes sanction an expenditure of the funds of a charity which tends to the general advantage of the school, although it is not calculated for the direct and immediate benefit of the boys on the foundation. Thus in the case of *Rugby School*, which was founded in Queen Elizabeth's time, and was to be a free grammar-school, at first, for the children of *Rugby* and *Brownsover*, and other places within a certain distance of *Rugby*. It having become, in process of time, a great public school, and the scholars who paid for their education having greatly outnumbered those on the foundation, sometimes in the proportion of ten to one; an act of parliament, 17 Geo. III. c. 71, passed, relative to the charity estates, among other things directing the trustees to lay before the Court of Chancery plans for the appropriation of the surplus rents. Under an order of reference for that purpose, a scheme was laid before the master, by which it was proposed to add 2*l.* a-year to 3*l.* before allowed to the schoolmaster for every boy educated on the foundation; to add to the number of exhibitioners; and to lay out several thousand pounds in rebuilding the schoolmaster's house, with proper accommodation for his boarders, and 500*l.* in repairing the other buildings. The master reported that he approved the scheme, except as to rebuilding the master's house and the repairs, and increasing the number of exhibitioners, stating that he did not approve such an application; as though he was of opinion that it

(*s*) *Attorney General* v. *Mayor, &c. of Stamford*, 2 Swanst. 502.

was proper and necessary as to both objects, yet having regard to the size and extent of the buildings proposed for such house and offices, and to the number and description of the masters, among whom were a *French* master and a drawing master, and to the number of boys educated, not more than an average of a fourth belonged to the charity; and of the exhibitioners, a third only was taken from such boys: it appeared to him, therefore, that such house and buildings were calculated for receiving boys of a different description, and for a different education, than were intended either by the founder or the act of parliament, and to the prejudice of the boys properly entitled to the benefit of the charity; and he did not approve the plan, as no consideration was had for the almsmen and almshouses, and the trustees, though required, did not lay before him any other plan.

The trustees having presented a petition to Lord *Eldon*, praying that notwithstanding the report they might be permitted to carry their plan into execution, his lordship ordered that the petitioners should be at liberty to carry into effect the plan or scheme for the disposition of the surplus income of the charity, so carried in before the master, and to pay the 2*l.*; to raise 14,000*l.* for the purposes in the said plan mentioned, and to enlarge the number of exhibitioners, &c. pursuant to the scheme proposed (*t*).

Letters-patent, in the 14th year of Queen Elizabeth, established a foundation, by *John Lyon*, of a grammar-school, with one schoolmaster and usher, at *Harrow*, for the perpetual education of children and youth of the said parish, and two scholarships at the University of *Cambridge*, and two at *Oxford*, and for the repair of certain roads; and the statutes made by the founder, among various regulations, directed that when any one or more of the governors appointed by the letters-patent should die, the others should appoint one or more fit and discreet persons within the parish of *Harrow*; that the governors should appoint a master at

(*t*) Case of *Rugby School*, stated by Sir W. Grant, 17 Ves. 505—507.

20*l.* *per annum*, and an usher at 10*l.*, or if so much could not be made of the rents, the surplus beyond the 20*l.*; that 20*l.* *per annum* should be paid to the four poor scholars at *Oxford* and *Cambridge*; and all the said places, as well of scholars in the said school as of the said poor scholars, to have the said exhibitions in the universities, to be indifferently appointed and bestowed, by the said keepers and governors, upon such as are most meet for towardness, poverty, and painfulness, without any partiality, &c.; and a meet and competent number of scholars, as well of poor, to be taught freely for the stipends aforesaid, as of others to be received for the further profit and commodity of the said schoolmaster, should be set down and appointed by the discretion of the governors.

The information stated, among various breaches of the statutes, that five of the six governors were not resident within the parish; that they were not duly appointed; that large sums had been improvidently laid out for repairs; that a sum of 2000*l.* had been allowed to the head master towards repairing and ornamenting his house, part of the possessions of the school, which had been greatly enlarged for the reception of boarders, taken in by him as foreigners, to be educated at the school, instead and to the prejudice of the children of the poor inhabitants; which house was decorated with every elegance and conveniency, and was occupied at no rent, or a very trifling one; and he was permitted to reside at that house, at a considerable distance, instead of the old schoolhouse, where he was directed to reside, and which, if not sufficiently capacious, is directed and ought to be made so; that few or none of the children of the inhabitants of the parish or town of *Harrow*, for whose benefit the said free grammar-school was originally instituted, had been educated there, nor could they be safely or properly sent there: for, though the master and governors did not actually refuse to admit such children when offered, yet by taking into the school so many foreigners, to the amount of 250 or more, (which he was permitted to do by the connivance of, and without any restriction and limitation from, the

governors), who were chiefly the sons of the nobility and gentry of this kingdom, they rendered it impossible for such poor children to remain in the school; being constantly scoffed at and ill-treated by the other boys, and their lives not only rendered uncomfortable, but often in great danger, insomuch that parents of such children had been obliged to take them away from the school; many instances of which had happened; whereas, by the rules and orders of the charity, the master was permitted to take into the school so many foreigners only as could be taught without prejudice or neglect of the children of the poor inhabitants of the parish, for whose direct and more immediate benefit the said free grammar-school was founded.

The information further stated, that the habits and manners of the youths who were admitted as foreigners, and the expensive establishments they were under, rendered it impossible for the inhabitants to keep their children on the same footing, and very dangerous to their future plans and prospects in life, especially as they were too apt to imbibe the extravagant and expensive ideas, as well as pernicious habits, of the young men of fortune admitted into the school; that all the governors, except the vicar, were resident at a distance; and a receiver was appointed by them at a large salary; and that the master had received a great number of foreigners, without the judgment of the governors expressed.

The information prayed an account of the revenues; the removal of the governors not duly appointed, and the appointment of others; a reference to the master for that purpose, and to approve a plan for the better regulation of the school, and the admission of the children of the inhabitants, &c.; and generally for the establishment of the charity.

Sir *W. Grant*, M. R. said, "In the conception of the relators, the school no longer answers the purpose of its foundation; and in that view the whole expenditure may be said to be misapplied. Considering, say they, the very small proportion which the parish boys taught at *Harrow* school bear to the other scholars who resort thither, the income of the founder's estate is employed rather in provid-

ing for the more commodious education of the rich, than in supplying a gratuitous education to the poor; and it is contended that some measure ought to be adopted by the court for securing to the inhabitants of the parish the full benefit intended for them by this institution.

"We must see in what sense it is asserted, or is true, that the inhabitants have not the full benefit of the institution, before we can judge whether any remedy is necessary or practicable. It is not alleged, that there is not a commodious school, that there are not competent teachers, or that any of the children of the parish are refused admittance into the school, or when admitted are not carefully taught. At first sight, then, it seems, that the benefit of the institution is within the reach of the inhabitants, so far as they choose to avail themselves of it; but it is said so many foreigners, that is boys not entitled as parishioners to be gratuitously educated, resort to this school, that the parishioners are deterred from sending their children to it, partly from the ill-treatment they receive from such foreigners, and partly from the apprehension of their acquiring expensive habits, by an association with persons of rank and fortune superior to their own. From this statement of the evil, it is difficult to conceive what remedy it is in the power of the court to apply. The most obvious, and the only complete one, would be the entire exclusion of foreigners. This, however, in the first place, would be incompatible with the intention of the founder, who did not mean to erect a mere parochial school; but has declared, that the master may receive, over and above the youth of the inhabitants within the parish, so many foreigners as the whole may be well taught, and the place can conveniently contain.

"No attempt has been made to show that this number has been exceeded. In the second place, would the parish itself gain by the conversion of this distinguished seminary of learning into a mere parish school? it cannot be supposed, that, for the present salary, a man of talents will be found to fill the place of master; and to give him a large salary is the last method that prudence would devise for securing

diligence and exertion in the obscure sphere to which he would be confined. As to the mere diminution and limitation of the number of foreigners to be admitted, it would not meet the evil of which these relators complain. I do not know what the number is from which bad habits may not be contracted, or ill-treatment suffered; but is it really true, that it is to the alleged causes that the paucity of parish scholars is to be ascribed? Why should *Harrow* be so unfortunately distinguished from the great number of schools in which the admission of other scholars does not in any way prevent those who choose it from taking the benefit of the foundation?"

His honour thought, that, upon the whole, evidence of the existence of the alleged conspiracy was by no means satisfactorily made out. It appeared, by the evidence of several parishioners, that the reason there were so few parish scholars was, that few of the inhabitants wished to give their children a classical education. His honour refused to take any step which might impair the general utility of the school, for the mere chance of adding a few more to the number of the scholars on the foundation. Although there was no objection to encouraging attention to parish scholars, by making a certain yearly allowance to the master for them, it was thought that any restriction on the number of other scholars, excepting that which the founder had prescribed, would be neither proper nor efficacious; and the court refused to make a reference to the master to frame a scheme with a view to any such object. It was also held that the expenditure was not to be measured by the number of parish boys, who were immediately benefited by it, if fairly referable to the purposes of the school. A considerable allowance to the master towards repairs, and a considerable expenditure in enlarging and improving his house for the accommodation of boarders, were not considered, upon the whole, extravagant, as a benefit from the increased revenue in that shape, instead of an increased salary, nor improper with reference to the general advantage of the school. The course of education and internal discipline was left to the governors and masters. The governors being expressly authorised to alter

the founder's rules, alterations long known and acquiesced in were presumed to have been made by their authority, though the precise order did not appear (*t*).

Where it appeared that there had been deviations from the will of the founder of a charity-school, by building a new school-room at a distance, and converting the old school-house into a dwelling-house for the master, by taking foreign pupils, so as to deprive the poor children of the master's attention, a decree was made for applying the surplus revenue, beyond the maintenance of the existing objects, which had arisen since the founder's death, *cy-pres* for the benefit of all the objects of the charity, who consisted of poor children, the schoolmaster, and almspeople (*u*).

The question of allowing boarders to be taken by the master of a free grammar-school, has often been before the Court of Chancery, and it has not been considered incompatible with the education of the free scholars: for, although many arguments may be urged against it, on the ground of one object tending to relax the exertions of the master on the other, still it is to be remembered, that by offering greater emoluments, a more competent master may be procured, and one better able to instruct the free scholars, besides the advantage of exciting competition among the boys. The public schools show that eleemosynary and stipendiary education may be combined, to the great advantage of both (*v*).

Where it appeared, that for many years before the appointment of the master of a school, it had been usual for the master to take boarders to be educated in the school, and therefore that it must have been the understanding upon the appointment of the master that he was to be at liberty to do so, Lord *Eldon* declared that so taking boarders was not inconsistent with the duty of the master of such school, unless it should occasion a breach of duty in the neglect

(*t*) *Attorney General* v. *Earl of Clarendon*, 17 Ves. 491—507.

(*u*) *Attorney General* v. *Coopers' Company*, 19 Ves. 186.

(*v*) *Attorney General* v. *The Dean and Canons of Christ Church*, Jac. Rep. 485, 488.

or improper treatment of, or a prejudice to the free scholars; and therefore that the master was to be at liberty to take boarders, in such number and to such extent as should be allowed by the acting trustees of the school for the time being, and should not occasion such neglect, improper treatment, or prejudice (*w*).

The master of a grammar-school will not be permitted to devote his time chiefly to the discharge of clerical duties, as minister of a chapel annexed to the school, nor to leave the actual labour of teaching to an usher, although the master exercises an occasional and general personal superintendence over the business of the school, by seeing that the usher performs his duty; but the court will enforce the performance of duty imposed on the master by the foundation (*x*).

So where the foundress of a charity appeared to have expected from the head-master a constant personal attendance at a grammar-school, as well as a residence in the house appropriated to him, and the emoluments annexed to the office were intended by her to be applied for the benefit of the person actually executing its duties, it was held that such intentions were not correctly fulfilled by the performance of those duties by a deputy, under the superintendence only of the person holding the situation of head-master (*y*).

Where a school was established for teaching the poor children of a parish *gratis*, the elements of reading, writing, and arithmetic, it was held by Lord *Eldon*, that although the master might employ an usher, and the court would even go the length of assisting that object with the surplus funds of the charity, yet if a master of the highest talents took the situation of master of such a school, it imposed on him the duty, whatever else he might attend to, of giving as much attention to the gratuitous education of the poor children, as if he had no other object. Therefore, that no one could hold such situation who would not devote all his

(*w*) *Attorney General* v. *Hartley*, 2 Jac. & Walk. 353.

(*x*) *Attorney General* v. *Earl of Mansfield*, 2 Russ. 530, 531.

(*y*) *In re Risley School*, Reg. lib. B. 1829, fol. 2298; *ante*, p. 367.

time and entire attention to that purpose, whether he employed an usher or not, and that it was the duty of the trustees and of the Court of Chancery to secure to the objects of the founder of the charity, according to his true meaning, the full benefit intended for them (*z*).

Where a free school is established, and the number of free scholars is not limited, and there is no other guide for determining that question, the court will settle it by reference to the amount of salary given by the founder to the master; and where, in 1732, 50*l. per annum* was given to the master, it was considered by the court as a reasonable salary for teaching 50 boys the learned languages, and on an augmentation of the salary to 100*l. per annum*, in 1822, the number of free scholars was limited to fifty (*a*).

Where the object of the founder is, that the boys who are admitted to a school shall be taught the learned languages after having gone through the elementary process, and children are sent, with a declaration on the part of the parents, that it was intended that they should be taught the elementary knowledge only, and then quit the school; the Court of Chancery would enforce the object of the founder, and compel the master to prefer other boys who were meant to acquire the learned languages (*b*).

Where a free grammar-school is founded by a Protestant, and no particular directions are given as to education, the court will establish it on the principle of religious instruction, according to the law of the land, forming a part of the plan. But the court having regard to the benefit of the children of a school, who were to be received at all ages, from seven to seventeen, and considering the intercourse that must take place between them, and the influence it might have upon their habits and principles, which it was of importance to preserve, would not establish any narrower restriction on the

(*z*) *Attorney General* v. *Coopers' Company*, 19 Ves. 191, 192.

(*a*) *Attorney General* v. *The Dean and Canons of Christ Church*, Jac. Rep. 474.

(*b*) *Attorney General* v. *The Earl of Mansfield*, 2 Russ. 531.

point of religion, than that the parents should be persons professing the Christian religion, and Protestants (*c*).

Where a testator directed a free grammar-school to be constituted in the borough of *Portsmouth*, it was held that the boys, whom the master should be required to educate, should be children of resident inhabitants of that place, or the children of persons who were resident inhabitants there at the time of the birth of such children, in case the parents were dead (*d*).

4. *When the doctrine of cy-pres will not be applied.*] If there is a legal purpose expressed, which owing to particular circumstances cannot be executed, the court will not execute the charitable purpose *cy-pres*, by directing the fund to be applied to another charity. Thus where the testator by his will, after devising his freehold and leasehold estates therein mentioned, and charging the same with the payment of annuities, disposed of his personal estate in these words: "I give and bequeath to my executors 100*l.* each, for their trouble in executing my will; and all the rest and residue of my personal estate I give and bequeath to them, in trust, to apply the same *to build a church at Wheatley*, where the chapel now is, in such manner as I shall hereafter direct, or for want of such direction, as my executors shall think best." On an information praying a general account and directions touching the plan and execution of the charitable bequest of the testator, the Bishop of *Oxford*, as patron and parson of *Cuddesden*, by his answer, opposed the erection of a new church, unless the surplus of the residue could be applied towards an augmentation of the endowment of the chapelry annexed; the chaplain and chapel-warden answered to the same effect, and proposed repairing the old chapel, and with the surplus augmenting the salary of the chaplain, &c. The next of kin insisted, that a new

(*c*) *Attorney General* v. *The Dean and Canons of Christ Church*, Jac. Rep. 485. See *in re Bedford Charity*, 2 Swanst. 527—531.

(*d*) *Attorney General* v. *The Dean and Canons of Christ Church*, Jac. 489, 490.

church or chapel must be built, and the surplus, if any, divided among them, and opposed the plan of repairing the chapel and augmenting the salary of the chaplain, &c., insisting that the intention of the testator must be implicitly followed; and in case the bishop did not allow a new chapel, that the bequest would be void, and the money divided. Lord *Kenyon*, M. R. held, that if the bishop objected he could not interfere nor direct the repairing, &c. The intention of the testator must be implicitly followed, or nothing could be done. It was, however, referred to the master to take an account, and to make a special report as to the plan of erecting a new chapel, and the expenses attending it, and also with respect to the bishop's assent (*e*).

Although where a charity is so given that there can be no objects of it, the court will direct an application to other purposes; yet if there be a probability that the specified

(*e*) *Attorney General* v. *The Bishop of Oxford*, 1 Br. C. C. 444 n. (*q*). See 4 Ves. 14; *ante*, p. 620.

It appears, 4 Ves. 432, that before this cause came on again, the next of kin and the persons entitled to the benefit under the will, the parishioners, acting by the bishop and their wardens, came to an agreement that 3000*l.*, part of the residue of the testator's personal estate, should be applied for the purpose of building a new church, and forming a fund for keeping it in repair, and that 1000*l.* part thereof, should be applied towards augmenting the minister's salary; and that 4000*l.* being paid for the purposes aforesaid, the residue should belong to the next of kin. This agreement is recited in the decree; and by consent it was ordered that the sum of 4000*l.* being paid for the purposes aforesaid, the residue be paid to the next of kin. Reg. lib. A. 1792, fol. 611.

Sir *R. P. Arden*, M. R. said, in *Corbyn* v. *French*, 4 Ves. 432, 433, "This decree is completely decisive, that the object not being capable of taking effect, the fund could not be applied to any other charitable purpose. The court could not have made the decree, unless they thought the residue was not applicable to any other charitable purpose. His honour would not say it could not have been applied for repairing or sustaining the chapel, and he doubted whether Lord *Kenyon* said so; but beyond that purpose, or after satisfying it, this is decisive that it could be applied to no other purpose; for if it was applicable to any other general charitable purpose, or any other purpose for the benefit of the parish, except of the nature pointed out, that decree could not have been justified."

objects will come into existence, the fund will be retained in court. Thus where a testator bequeathed 1000*l.* 3 *per cents.* for the purpose of establishing a bishop in his majesty's dominions in *America*, and also gave 1000*l.* for repairing parsonage houses, and ordered, that if any charity to which he had given a legacy should no longer subsist, such legacy should fall into the residue; it was objected, that there being no bishop in America, nor the least likelihood of there ever being one, that the legacy was void, and fell into the residue. But Lord *Thurlow* ordered the money to remain in court until it should be seen whether any such appointment would take place (*f*).

In the case of *Downing* college, already mentioned (*g*) which was a devise for founding a college requiring the king's license, which was not granted for a considerable time, the devised estates were retained in the hands of the court.

Where an intention appears in a testator's will to give the *whole* of a fund to a charity, the objects whereof are not sufficient to exhaust the *whole*, the court will apply the residue as nearly to the testator's designation as it can; but the court will not supply the want of objects without some apparent intention to guide the court, which cannot go so far as to dispose of a fund merely on seeing a *general* intention in the testator to die testate as to the whole (*h*).

The doctrine of *cy-pres* will not be applied in order to support a gift of personal estate to a charity, which fails on account of its being connected with the devise or purchase of real estate, although the gift of the personalty, if standing alone, would have been valid (*i*).

(*f*) *Attorney General* v. *Bishop of Chester*, 1 Br. C. C. 444; *ante*, p. 273. See *Attorney General* v. *Oglander*, 3 Br. C. C. 166.

(*g*) *Ante*, pp. 139, 140.

(*h*) *Attorney General* v. *Painter—Stainers' Company*, 2 Cox, 51.

(*i*) *Attorney General* v. *Goulding*, 2 Br. C. C. 428; *ante*, p. 195; *Attorney General* v. *Whitchurch*, 3 Ves. 141; *ante*, pp. 196—198; *Attorney General* v. *Hinxman*, 2 Jac. & Walk. 270; *ante*, pp. 201—203; *Attorney General* v. *Davies*, 9 Ves. 535; *ante*, pp. 177, 178.

5. Of the settlement of a scheme for the application of charitable funds.] When, in consequence of the altered circumstances of the times since the charitable gift, the increase of the revenues, the ambiguity of the trusts, or other causes, the trusts of the original foundation cannot be strictly pursued, and it becomes necessary to make new regulations respecting the management and application of charitable funds, the usual practice of the Court of Chancery is to refer the matter to a master of that court to settle a scheme or plan for the future regulation of the charity, with liberty for the parties interested to propose such plans as they shall think proper.

It appears, by preceding parts of this work (*k*), that where a bequest is to *trustees* for charitable purposes generally, without specifying any particular objects, the fund will be disposed of according to a scheme settled by the master.

A reference to the master to settle a scheme may be made on petition, under the stat. 52 Geo. III. c. 101 (*l*).

Where a testator showed a clear intention to dispose of the whole dividends of a sum of stock for the benefit of charitable institutions, and specified some of them, but left blanks for the names of others, it was referred to the master to settle a scheme for the application of the dividends which were not appropriated, regard being had to the nature and character of the other gifts in the will (*m*).

Where the trusts of a deed and will were to found a school for the education of gentlemen's sons in a particular house, built by the founder, and it was provided, that if the school was not established the funds should be applied, at the discretion of the trustees, to some other purpose conducing to the good of the county of *Westmoreland*, and the parish of *Lowther* especially; the charity, as to the school, having altogether failed, by the schoolhouse having been built on a part of the founder's family estate of which he

(*k*) *Ante*, pp. 270, 536.

(*l*) *Ex parte Fowlser*, 1 Jac. & Walk. 70.

(*m*) *Pieschel* v. *Paris*, 2 Sim. & Stu. 384. See *Baylis* v. *Attorney General*, 2 Atk. 239; *ante*, p. 527; *Wheeler* v. *Sheer*, Mos. 288; *ante*, p. 520.

was tenant for life only, it was referred to the master to settle a scheme for the application of the rents and profits of the several premises to some charitable purpose or purposes conducing to the good of the county of *Westmoreland*, and especially of the parish of *Lowther*, and for the future trusts and management thereof (*n*): for the words of the gift amounted to a clear direction that if, for any reason, the testator's intention as to the schoolhouse should fail, the property intended for its endowment should be applied to other charitable purposes, which the court was bound to effectuate.

The court frequently directs a scheme, even where an unlimited discretion as to the distribution of a residue is left to a trustee, and where consequently a scheme can answer no purpose but to show that the whole fund is applied to the proper objects (*o*).

Where the purposes to which, after providing for the sustentation of the school, the surplus income is to be applied, are partly specified by the founder's rules, and partly left to the discretion of the governors; and it appears that the application of the income of a school is not, in all respects, agreeable to the directions of the founder, the court will direct the future application to be settled by a scheme, having due regard, on the one hand, to the founder's directions, and on the other, to the alteration of circumstances since his time, and which may be such as to render a literal adherence to his rules adverse to their general object and spirit (*p*).

Where in respect of the increased rents of a charity estate, it is referred to the master to approve a scheme for their future application, and he recommends an augmentation of a salary given by the will of the founder, the master, with respect to the augmentation, is not confined to the provisions in the will of the founder, but may stipulate for an addi-

(*n*) *Attorney General* v. *Earl of Lonsdale*, 1 Sim. 110, 111.

(*o*) *Supple* v. *Lawson*, cited by Sir *Wm. Grant*, M. R., in *Waldo* v. *Caley*, 16 Ves. 211.

(*p*) *Attorney General* v. *the Earl of Clarendon*, 17 Ves. 500.

tional advantage, in furtherance of his general intention, as the introduction of a condition requiring the residence of the lecturer, who was the object of the charity (*q*).

Where money had been bequeathed for the purpose of being lent out without interest, in sums not exceeding 200*l.*, and the master, in settling a new scheme for the charity, had directed the maximum of the sums lent out to be 500*l.*, it was held, that as the latest of the wills was 200 years old, the increase in the amount of the loans, regard being had to the alteration in the value of money, was not inconsistent with the intention of the testator (*r*).

The only way of administering a charity is by a general direction to the trustees; and in case of their misbehaviour, there must be a new information, but the court will not retain an information, in order to execute the trust from time to time (*s*).

It is not the practice of the court to retain the direction of the application of the future increase in charity funds; but after the settlement of a scheme, the trustees are to administer the charity, and the court only informs them what is to be done, and the course which it is their duty to pursue (*t*).

Where a surplus revenue of a charity is to be distributed beyond repairs and other charges, the master ought to report the shares in *aliquot* parts, and not in moneys numbered, for the surplus from various causes, as failure of tenants, must be an uncertain sum (*u*).

It has been already stated that the rule, requiring the attendance of the attorney general before the master on the settlement of a scheme, is sometimes dispensed with (*v*).

(*q*) *Ex parte Lane in re Kingsbridge School*, 4 Madd. 479.

(*r*) *Attorney General* v. *Mercers' Company*, 2 Mylne & Keen, 654.

(*s*) *Attorney General* v. *Haberdashers' Company*, 1 Ves. jun. 295. Upon an information against the trustees of a charity, Lord *Hardwicke*, though he did not see any ground to make a decree, would not dismiss the information, but kept it on foot, in order to have control over the trustees. *Attorney General* v. *Governors of Harrow School*, 2 Ves. sen. 551. See *Attorney General* v. *Townley*, *ante*, p. 442.

(*t*) *Attorney General* v. *Solly*, 5 Law Journ. N. S. Chanc. 5.

(*u*) *Attorney General* v. *Haberdashers' Company*, 1 Ves. jun. 295; *S. C.* 4 Br. C. C. 103.

(*v*) *Ante*, p. 401.

The court will not direct a scheme to be laid before the master, where there is a great latitude of description in the will, and it is not a residue, or a sum in gross, that is once for all to be distributed, but part of an annual and temporary income, to be disposed of from year to year, according to a discretion to be exercised every year, and possibly every day, it seems very difficult for the court to take upon itself the direction and management of the fund so to be applied, as it would require a scheme to be laid before the master every year.

In a case, therefore, where there was neither any allegation, nor even suspicion, that the fund had been, or would be, withheld, the court would not impose upon the party to whom the power of distribution was given, at the expense of the charity, the necessity of annually accounting for the employment of the fund before the master. As that purpose might be answered by reserving to any of the parties liberty to apply as there might be occasion; so that, if at any time there should be ground for supposing that the fund had not been fairly expended, the court might be called upon to interfere.

Thus where a testator bequeathed all his personal estate whatsoever and wheresoever, after payment of his debts, to two trustees, their executors, and administrators, "upon trust to pay the neat income, interest, dividends, and proceeds thereof, from time to time as the same shall arise and grow due and become payable, unto his wife and her assigns, for and during the term of her natural life, or otherwise to permit and suffer her to receive the same; but, nevertheless, I do hereby most solemnly enjoin, and earnestly desire, and I am thoroughly persuaded, from the invariable fidelity and attachment my dear wife has always shown towards me, that she will, after my decease, with the utmost readiness and cheerfulness, co-operate with my said trustees in carrying my wishes into execution; and therefore, having made a very considerable provision for my said dear wife, by this my will, I do direct and desire that she will, with the advice and assistance of my said trustees, or the survivor of them, yearly and every year, during her life, lay out and expend one moiety or

half part of the neat income of my personal estate, in promoting charitable purposes, as well those of a public as of a private nature, and more especially in relieving such distressed persons, either the widows or children of poor clergymen or otherwise, as my said wife shall judge most worthy and deserving objects, giving a preference always to poor relations," and after the decease of his wife upon trust to pay and assign all his personal estate and effects among the children of two persons therein named.

Sir *W. Grant*, M. R. was of opinion, that the testator's intention was to vest in his wife a discretionary power of distributing to such charitable purposes as she should think fit; and therefore, though the trustees were to advise and assist, yet in case of a difference of opinion, it was hers that must prevail. Into her hands the whole money was to be paid; by her the distribution was to be made; and by her judgment the fitness of the object was to be determined. There was hardly an opening for them to interfere, except by their advice and assistance. Advice did not include decision, nor did assistance imply the power of control.

It was decreed, that the funds forming the clear residue of the testator's personal estate should be transferred to the accountant-general, and that he should, from time to time, pay one moiety of the interest and dividends to the testator's widow, for her own use, and pay her the other moiety, in order that she might, from time to time, apply the same to such charitable objects and purposes as by the will expressed, and permit her to receive a surplus arising from the charitable fund in the defendant's hands to be applied to the same purposes (*v*).

We have already seen that the Court of Chancery will not give directions for the establishment of a charity in *Scotland* (*w*). So where a charity is to be established in any other country out of *England*, the Court of Chancery, not having any jurisdiction to administer the fund, will order the money

(*v*) *Waldo* v. *Caley*, 16 Ves. 206. See *Horde* v. *Earl of Suffolk*, 2 Mylne & Keen, 59; *ante*, p. 529; *Powerscourt* v. *Powerscourt*, 1 Molloy, 616; *ante*, p. 530.

(*w*) *Ante*, pp. 260, 262.

to be paid to the trustees whom the testator has appointed, without the settlement of any scheme. Thus a fund, bequeathed to a charity at *Lyons*, was ordered to be paid to two of the plaintiffs, as attorneys of their co-plaintiff, the mayor of *Lyons*, under a power of attorney, which authorised two or one of them to receive the money; and the same course was pursued where the charity was to be distributed in *Switzerland* (*x*). So a fund, given by will, which had been invested in the accountant-general's name, to a corporation in *England* for a charitable purpose in *America*, was ordered to be paid to the corporation without the settlement of any scheme, it appearing that the testator had reposed confidence in them (*y*).

6. *Of the apportionment of charitable funds.*] If a gift is for the poor of any city, and other parishes are afterwards admitted within its precincts, such parishes will be entitled to a proportion of the charity. Thus where a testator gave property for building almshouses in the city of *Rochester*, and by a subsequent deed provision was made for the poor of the said city and the liberties and precincts thereof, and afterwards the bounds of the city were enlarged by charter, it was held that the poor who inhabited the parts added to the city should participate in the revenue of the charity, which had greatly increased (*z*).

In 1808, an information was filed on behalf of a fourth parish for a similar purpose, and that parish was decreed to be entitled to a share of the rents, in the proportion of its extent and population to the extent and population of the three other parishes, but the proportions, as between those parishes were not to be altered. An information, afterwards filed on behalf of one of those three parishes, claiming an increased share of the rents, on account of its population having increased more than the population of the other

(*x*) *Martin* v. *Paxton*, 24th Feb. 1824, cited 1 Russ. 116; *Minet* v. *Vulliamy*, cited Id. 113 n.

(*y*) *The Society for the Propagation of the Gospel in Foreign Parts* v. *Attorney General*, 3 Russ. 142.

(*z*) *Attorney General* v. *Mayor, &c. of Rochester*, Finch, R. 193.

parishes, was dismissed, the decree in 1680, which had been since acted upon, being final (*a*).

On an information, at the relation of the inhabitants of the Rolls liberty, in *Middlesex*, for an account of charities given by several deeds and wills to the poor of the parish of *St. Dunstan in the West, London*, of which the liberty of the Rolls was part, it appeared that since the statute 43 Eliz. c. 2, before which there were no such officers as overseers of the poor, that such part of the parish of *St. Dunstan* as lay in *London*, had appointed distinct overseers, made distinct rates, and maintained their poor separately, which made them a distinct parish. The court therefore decreed, that such part of the parish as lay in *London* should have the benefit of all charities given by deed or will to the parish of *St. Dunstan*, after the statute 43 Eliz.; but that the Rolls liberty should have a proportion of all gifts to charities made before that act, when the parish was united (*b*).

Lands were devised to the parson and churchwardens of the parish of *St. Austen*, in *London*, and their successors, to the intent that the rents, after certain charges were defrayed, might go to the use of that parish church, at the discretion of the parson and churchwardens, and their successors. After the fire of *London*, that parish was united with the adjoining parish of *St. Faith's*, and the church of *St. Austen* thenceforth became the parish church of the two united parishes. The act 22 Car. II. c. 11, s. 68, by which the two parishes were united, declared, that notwithstanding such union, each of the parishes, as to all rates, taxes, parochial rights, charges, and duties, and all other privileges, should remain distinct as theretofore. It was held, that the parishioners of *St. Faith's* had no right, either under the will nor the act of parliament, to have any part of the rents applied in ease of that proportion of the expenses of maintaining the

(*a*) *Attorney General* v. *Mayor of Rochester*, 6 Sim. 273, 322.

(*b*) *Attorney General* v. *Grant*, *Rector of St. Dunstan's*, 1 P. Wms. 669.

church of the united parishes which they were bound to defray (*c*).

The court will direct a scheme making an unfair division of property between the objects of the donor's bounty to be corrected.

By indentures of lease and release, dated in August, 1635, Sir *John Hayward*, of *Rochester*, in *Kent*, conveyed a manor and other premises in the isle of *Sheppey*, to the use of himself in tail, with remainder to such uses as he should by will or deed appoint; and in default thereof upon trust, to make sale thereof, or otherwise convey and settle the same for the erection of workhouses, to set the poor on work, and otherwise for the relief of the poor in such parishes, and in such manner as four trustees therein named, or the survivors or survivor of them, their heirs or assigns, should think fit, so as the parish of *St. Nicholas*, in the city of *Rochester*, wherein the said Sir *J. Hayward* then dwelt, should be one of the said parishes. The estate having been sold under the direction of the Court of Chancery, it was held that a scheme carried into effect under the direction of the court, by which a small part of the income was devoted to *St. Nicholas*, and the chief part of it was to be applied for the support of almshouses and a school in the parish of *Crediton*, in *Devonshire*, was not conformable to the trusts; and although the court thought it not right that the charity should have been originally confined to two parishes, yet in consequence of the difficulty of altering the application after what had taken place, an equal division was directed, and so much was appropriated to the benefit of the parish of *St. Nicholas*, as with what had been before set apart for it, would make one half of the whole property, and the rest was to be applied to the charity at *Crediton* (*d*).

Where the distribution of the funds by the original gift is in proportions which altogether exhaust the income of the charity at that time, the distribution of the revenues when

(*c*) *Attorney General* v. *Vivian*, 1 Russ. 226, 234.

(*d*) *Attorney General* v. *Buller*, Jac. Rep. 407.

augmented, must be in the same proportions, by making an addition to the share of each (*e*).

Where a specific sum is given to one charity out of property devoted to charitable purposes, and the remainder of such property to another charity, the first is not entitled to participate in the increase of the income; although where the whole income is given in certain proportions to the whole rent, each is entitled to share in such increase (*f*).

Thus, in the year 1602, a testator devised a messuage in *Southwark*, then let at the yearly rent of 10*l.* to the parson and churchwardens of *St. Mary Magdalen*, *London*, and their successors, upon trust, to pay yearly for ever unto the parson and churchwardens of *Walton*, in *Lancashire*, and to their successors, 54*s.*, *viz.* 52*s.* for buying bread for the poor, and 2*s.* to the churchwardens for their pains therein; upon further trust to pay out of the rents of the said premises, to two honest men of the town of *Bootle*, 30*s.*, to provide a dinner every St. Thomas's-day, before Christmas-day, for the householders and married people of that town, and 30*s.* for a supper on the same day, for all the youth and young people of the same town. The testator then gave 54*s.* to another charitable purpose, and the other 42*s.* of the said yearly rent of 10*l.*, he referred "to the good discretion of the said parson with the common council of the said parish, and the churchwardens, whether to dispose of to the poor of the said parish, or towards paying of fifteenths for such as were not able to pay, being no subsidy people." There being an increase in the value of the property, an information was filed against the rector and churchwardens of the parish of *St. Mary*, for a division of the present and future rents between the said parishes of *St. Mary Magdalen*, *Walton*, and *Bootle*. Sir *C. Pepys*, M. R., decided that the gift of 42*s.*

(*e*) *Attorney General* v. *Tonna*, 2 Ves. jun. 1; *S. C.* 4 Br. C. C. 103. *Ex parte Berkhampstead Free School*, 2 Ves. & B. 139. See *ante*, p. 545, 548, 615.

(*f*) *Attorney General* v. *Solly*, 5 Law Journ. N. S. Chanc. 5. 17th November, 1835. See *Attorney General* v. *The Skinners' Company*, 2 Russ. 443; *ante*, p. 578, where an apportionment was not directed.

was not as had been contended, a gift of the residue, but was a proportionate part of the rent of 10*l.* a-year devised by the testator, for the several charitable purposes mentioned in his will; and that the whole surplus arising from the increase of the rent, was to be applied in the proportions designated by the testator, to the several objects of charity, so far as the same were capable of being carried into effect, and as nearly as might be, where it became necessary to modify the specified objects of the charity. A reference was directed to the master, to settle a scheme for the several charitable bequests, with liberty to state special circumstances (*g*).

By 3 Geo. IV. c. 72, s. 10, in case of the division of any parish into separate parishes for ecclesiastical purposes, or into separate districts, or chapelries, in which select vestries shall be appointed by the commissioners for carrying into execution the acts for building additional churches, under those acts (*h*) all the members of the select vestry of the original parish, who shall reside in or belong to the district or division of the original church or chapel of the parish or place, shall continue to act as the vestry of such district or division, in ecclesiastical matters, "or in the distribution of any proportion of any bequests, gifts, or charities, which may, under the provisions of that act, be assigned to any such district or division"; provided that no member of any select vestry shall, after such division, act in any ecclesiastical matters, except such as relate to the division in which he shall reside; and if by reason of such division, a sufficient number of such members of select vestry shall not remain resident in the division wherein the original church or chapel shall be situate, according to the proportion fixed by the commissioners, (regard being had to the population of such division, and its relative proportion to the population of the whole parish or place,) all such deficiencies shall be filled up as vacancies have before been filled up

(*g*) *Attorney General* v. *Barham*, 4 Law Journ. N. S. Chanc. 128; *Thetford School* Case, 8 Rep. 130 b; *ante*, 545, 546.

(*h*) 58 Geo. III. c. 45; 59 Geo. III. c. 134.

therein; provided that no person shall vote in supplying such deficiencies, unless resident within the division for which the members are to be chosen; provided that the persons chosen, shall not thereby be members of the vestry for any other purposes than such as relate to the ecclesiastical affairs of the division for which they shall be chosen, or for the *distribution of any charitable gifts therein;* provided that all the members of the select vestry of any such parish or place, resident in any other divisions thereof, shall be members of such vestries as shall be appointed under the acts, for the divisions in which they shall reside.

The 11th section of stat. 3 Geo. IV. c. 72, enacts, that "it shall be lawful for the said commissioners in every case in which they shall be of opinion that it will be expedient to divide, or in which the said commissioners shall have divided any parish or place, into two or more distinct and separate parishes, district parishes or chapelries, for ecclesiastical purposes, under the provisions of the acts therein recited (*i*), to apportion, if the commissioners shall, in their discretion, think it expedient, among such separate divisions of any such parish or place so made separate or district parishes or chapelries, for ecclesiastical purposes, any charitable bequests or gifts which shall have been made or given to any such parish or place, or the produce thereof; and in any such case, to direct that the distribution of the proportions of such bequests or gifts, or the produce thereof, as shall be so apportioned to any such separate divisions of any such parish, shall be made and distributed by the spiritual person serving the church or chapel of any such separate divisions, or the church or chapelwardens or select vestry of any such separate divisions, either jointly or severally, as the commissioners may in their discretion (regard being had to the nature of the bequest or gift, and the application thereof) think expedient," and also to apportion debts charged on the church rates; all such apportionments to be registered in the registry of the diocese in which

(*i*) 58 Geo. III. c. 45; 59 Geo. III. c. 134.

the parish or place shall be locally situate, and the duplicates thereof deposited with the churchwardens of each such separate districts as aforesaid, in respect or in relation to which any such apportionments as aforesaid shall have been made.

SECTION IV.

Of Bequests to Charity void for uncertainty.

We have already seen (*j*), that when an undefined portion of a fund is given to a charity void by the stat. 9 Geo. II. c. 36, and the residue of such fund for charitable purposes, which, if standing alone, would be legal, but it cannot be ascertained how much was intended, or would be required for the illegal object, the gift will fail altogether; because, the gift was of a *surplus* without the means of ascertaining what the amount of it would be.

Where a trust is so general and indefinite that it cannot be ascertained, the consequence is, that the fund must either go as an absolute gift to the individual selected to distribute it, or such individual will be a trustee for the next of kin; if the testator meant to create a trust, and the trust is not effectually created, or fails, the next of kin must take; and on the other hand, if the party selected to make the distribution is to take, it must be upon the ground that the testator did not intend to create a trust, but to leave it entirely to the discretion of the party to apply the fund or not.

If a testator who intends to create a trust, and not to make an absolute gift, does not effectually create or express any trust, or the trust fails, the next of kin are entitled. Where upon the face of the will there is a plain declaration that the person to whom the property is given, is to take it in trust, although the trust is not declared, or is ineffectually declared, or becomes incapable of taking effect, such person is a trustee, if not for those who were to take under the will, yet for the next of kin (*k*).

(*j*) *Ante*, pp. 200—203. (*k*) 10 Ves. 435, 537.

Where the trust of personal estate is too vague and uncertain for the court to execute, the next of kin are entitled. Thus where a testatrix bequeathed the residue of her property to her executors, "*upon trust* to dispose of the same at such times, and in such manner, and for such uses and purposes as they shall think fit, it being my will that the distribution thereof shall be left entirely to their discretion;" it was held that the executors were trustees of the residue of the property for the next of kin of the testatrix (*l*).

A bequest to purchase and circulate such books as would have a tendency to promote the interests of virtue and religion, and the happiness of mankind, was held void for uncertainty.

Personal estate was vested by will in trustees, to be from time to time for ever applied "in the purchasing of such books, as by a proper disposition of them under the following directions might have a tendency to promote the interests of virtue and religion, and the happiness of mankind; the same to be disposed of in *Great Britain*, or in any other part of the *British* dominions; this charitable design to be executed by and under the direction or superintendency of such persons, and under such rules and regulations as by any decree or order of the High Court of Chancery shall, from time to time, be directed in that behalf." Lord *Thurlow* was of opinion, that the testator not having given to the Court more of specific direction as to the nature of the books to be purchased and circulated, than that they were to be such as might have a tendency to promote the interests of religion and virtue, and the happiness of mankind, had not given direction enough, and therefore that the next of kin were entitled (*m*).

Sir *William Grant*, M. R., thought this a doubtful case, as there was ground for contending, that the particular purpose specified was charitable in itself, according to the decided cases, and it was described by the testator as a charitable design (*n*).

(*l*) *Fowler* v. *Garlike*, 1 Russ. & M. 232. See *Gibbs* v. *Rumsey*, 2 Ves. & B. 297. *Ante*, p. 221.

(*m*) *Brown* v *Yeale*, stated in 7 Ves. 50 n. See 10 Ves. 47.

(*n*) 9 Ves. 406. See 10 Ves. 27.

Lord *Eldon* recognized (*o*) the principle of *Brown* v. *Yeale*, but doubted whether it was well applied in that instance, and explained the ground upon which that trust was ill declared. "As it is a maxim, that the execution of a trust shall be under the control of the court, it must be of such a nature that it can be under that control, so that the administration of it can be reviewed by the court; or, if the trustee dies, the court itself can execute the trust; a trust, therefore, which in the case of maladministration could not be reformed; and a due administration directed; and then, unless the subject and the objects can be ascertained, upon principles familiar in other cases, it must be decided, that the court can neither reform maladministration, nor direct a due administration. Upon the question whether that principle was well applied in that instance, different minds will reason differently." His lordship added, that he should have been disposed to say, "that where such a purpose was expressed, it was not a strained construction to hold, that the happiness of mankind intended was that, which was to be promoted by the circulation of religious and virtuous learning; and the testator having stated that to be a charitable purpose, which unquestionably was so, the distribution of books for the promotion of religion, the court might have so understood him; and the testator having not only called it a charitable purpose, but delegated the execution to the Court of Chancery, ought to be taken to have meant that."

But where there is a denotation of a religious purpose, to which the fund may be applied, with an option as to the mode of application, one term of such option will be executed; as, where a testatrix bequeathed to trustees the residue of her personal estate, "for the use of the Welsh circulating charity schools, as long as the same should continue, and for the increase and improvement of Christian knowledge, and promoting religion, in such manner as the trustees for the time being should think most proper and conducive to the said charitable purposes; and moreover, that they should purchase from time to time new bibles and other religious books,

(*o*) 10 Ves. 539, 540.

pamphlets and tracts, as they should think fit, for such pious uses and purposes as were intended concerning those already bought; and should apply and dispose of the said books, effects and personal estate accordingly; and in the mean time should deposit all the said bibles, books, pamphlets and tracts in the house" which she devised for that purpose; and also made provision for keeping up the number of her trustees. The devise of the house was declared void; and although there might be some objection to the direction as to the tracts, because their nature was not ascertained, yet there was enough in the will to give the personal property to charitable purposes, connected with the plan of promoting Christian knowledge. A scheme was directed to be settled, regard being had, as far as reasonably might be, to the particular charity pointed out, with checks for the purpose of making it conformable to the establishments of the country (*p*).

It appears by cases already stated, that a *charitable* purpose, expressed in the most general and indefinite terms, will not fail on account of the uncertainty of the objects intended to be benefited; but the particular mode of application will be directed by the king in some cases, and in others, by the Court of Chancery (*q*). So a substantial intention of charity will be carried into effect, although the particular objects have failed by accident or a change of circumstances; and even where it is left altogether uncertain what charity or what individuals are the objects of the donor's bounty, and no means for ascertaining them are provided, except such as have altogether failed by the death of the persons to whom a discretionary power of selection was given, yet the charitable intention will be effected.

Where a general charitable intention is absolutely declared by a testator, and nothing is left uncertain but the mode in which it is to be carried into effect, the court will supply the mode which alone is left deficient; and although

(*p*) *Attorney General* v. *Stepney*, 10 Ves. 22; *ante*, p. 204.

(*p*) *Ante*, pp. 270, 518.

a testator shows that he contemplated a division in certain proportions which he has failed to render certain, such uncertainty will not prevent his general charitable intention which is expressed from taking effect in some other mode (*r*). But in all such cases it is necessary that a charitable purpose, as understood in the Court of Chancery, should be expressed, for otherwise the court cannot give it effect.

Where a trust is in such general terms that the fund may be applied at the discretion of the trustees, not only to purposes strictly charitable, according to the settled meaning of that term (*s*), but also to other indefinite purposes of benevolence or liberality, it is void; for the court cannot direct the application of any part to charitable uses, against the words of the trust, giving an option to the trustees to apply it wholly to other purposes of a different kind.

The question in *Morice* v. *the Bishop of Durham* (*t*), where the gift was for such objects of benevolence and liberality as the bishop should most approve of, was entirely whether it was, according to the intention of the testator, a gift to purposes of charity in general, as understood in the Court of Chancery, and of such a nature, that the court would have held the bishop bound, and would have compelled him to apply the surplus to such charitable purposes as could be answered only in obedience to decrees where the gift is to charity in general; or was it, or might it be, according to the intention, to such purposes, going beyond those partially or altogether which the court understands by *charitable purposes;* and if that was the intention, was the gift too indefinite to create an effectual trust, to be executed in that court?

For although, on the one hand, the bishop might, under the words of that bequest, have devoted the whole property to charitable purposes; so, on the other hand, he might have applied the whole to purposes benevolent and liberal, and

(*r*) *Mills* v. *Farmer*, 1 Mer. 55; *S. C.* 19 Ves. 483; *ante*, pp. 521, 522.

(*s*) *Ante*, pp. 59—61.

(*t*) 9 Ves. 399; 10 Ves. 522.

yet not within the meaning of charitable purposes, as construed by that court; and having such general power, the court could not have charged him with maladministration for applying the whole to purposes, which, according to the meaning of the testator, were benevolent and liberal, though not charitable, in a legal sense.

If the real meaning of the words had been charitable purposes, in the technical sense, all the consequences would have followed; but the testator intending to go beyond that, and to repose in the bishop a discretion, not to apply the property for his own benefit, but to purposes more indefinite than charity, without naming them, the case came within that class of cases, where the purposes were not sufficiently defined to be controlled and managed by the court. Lord *Eldon* was of opinion, that the testator did not mean to confine the trustee to such acts of charity, or charitable purposes, as the court would have enforced by decree and reference to the master; and although it was his intention to create a trust, the object was too indefinite, and consequently failed, and the property was to be disposed of, as the law would have done (*v*).

For the same reason, a trust for such *benevolent* purposes as the testator's three executors in their discretion should unanimously agree on, was held void for uncertainty (*u*). For every object of benevolence is not charity, and the concurrence of three persons, in the selection of the objects, did not of necessity exclude the appropriation of the property to purposes very different from those which are charitable in a legal sense. The court had no authority to declare, that the property must not be applied to purposes however so benevolent, unless they also came within the technical denomination of charitable purposes. And as it might consistently with the will be applied to other than strictly charitable purposes, the trust was too indefinite for the court to execute.

(*v*) 10 Ves. 543. See 9 Ves. 399; *ante*, p. 85. See *Vesey* v. *Jamson*, *ante*, p. 83. 1 Sim. & Stu. 69; *ante*, p. 84.

(*u*) *James* v. *Allen*, 3 Mer. 17;

A bequest by a testator, after legacies to individuals and public charities, of any money remaining to be given by his executors *in private charity*, was held to fall within the principle of the cases in which there is no object sufficiently definite to give the crown or the court jurisdiction to execute the trust; there being no case in which *private charity* has been made the subject of disposal by the crown, or been acted upon in the Court of Chancery. The charities recognized by that court are public in their nature, and such as the court could see to the execution of. Private charity is in itself indefinite, and can neither be controlled, nor carried into execution. As a general purpose of charity, the object of the testator could not be carried into execution, as a trust it was not sufficiently specific or definite; the next of kin were therefore held to be entitled (*w*).

Where a testator directed his trustees to pay, apply, and distribute certain funds, "to and for such charitable or *other purposes* as his said trustees, or the survivor of them, should think fit, without being answerable or accountable to any person or persons whomsoever, for such their disposition thereof."

Although it was admitted, that if it could have been collected from the will, that nothing else but charity was meant, the bequest would have been good, and fallen within the cases of *Waldo* v. *Caley* (*x*), and *Horde* v. *Earl of Suffolk* (*y*), in which nothing but charity was pointed at; yet, inasmuch as the testator had expressly drawn a distinction between charitable and *other purposes*, he must be taken to have meant by that expression purposes which were not charitable. And whether these other purposes were such as would give to the trustees, or to any other persons, a beneficial interest was immaterial, because the testator had made it uncertain what the other purposes were; and the case was the same as if he had said, I give to A *or* B; and, therefore,

(*w*) *Ommanney* v. *Butcher*, 1 Turn. & Russ. 265; *ante*, p. 85.

(*x*) 16 Ves. 206; *ante*, p. 655.

(*y*) 2 Mylne & Keen, 59; *ante*, p. 529.

that part of the bequest was void for uncertainty, and fell into the residue (*z*).

There are many cases in which a devise or bequest of *what shall remain* or *be left* at the decease of the prior devisee or legatee, has been held to be void for uncertainty (*a*).

A limitation of so much of the estate bequeathed as the legatee, to whom it was given absolutely, should be possessed of at his death, to a corporation, for a charity, upon an information for establishing it, was held void (*b*).

The court will not execute a power given by a testator to the trustees of his will, to continue his charities, or to give any others they should think fit. Thus, a testator, after having given his real estates and the residue of his personal estates to trustees for the purposes therein mentioned, recited in his will that there might be services done by different people, and that divers small sums, charities, and benefactions had been given and paid by him and his three late brothers; and he then *authorized and empowered* his trustees to pay and satisfy such person and persons for such services when performed, and to continue such charities and benefactions, or bestow any other, as they in their discretion should think fit; provided the same did not exceed in the whole the sum of 1,000*l.* The court said that it could not establish the charity for uncertainty. The direction was certainly void as to the real estate; and as a legacy out of the personal, it did not appear how long it was to endure. The testator was an annual subscriber as long as he pleased; he meant to recommend only; the words were not mandatory, but to exempt the trustees from being called to an account for doing it (*c*).

A testatrix bequeathed the sum of 100*l.* to be put out by

(*z*) *Ellis* v. *Selby*, V. C. 23rd March, 1835, 4 Law Journ. N. S. 69—72. Affirmed by the Lord Chancellor on appeal, Hilary Term, 1836.

(*a*) *Bland* v. *Bland*, 2 Cox, 309; *Wynne* v. *Hawkins*, 1 Br. C. C. 179; *Sprange* v. *Bernard*, 2 Br. C. C. 585; *Pushman* v. *Filliter*, 3 Ves. 7; *Wilson* v. *Major*, 11 Ves. 205; *Bull* v. *Kingston*, 1 Mer. 314; *Eade* v. *Eade*, 5 Madd. 118.

(*b*) *Attorney General* v. *Hall*, W. Kelynge's Cas. Ch. 13.

(*c*) *Coxe* v. *Basset*, 3 Ves. 157, 164.

her executors, and the interest to be annually paid by them to the Rev. J. B. of W. and to his successors, so long as he the said J. B. and his successors should teach in the town of W. the gospel of Christ, under the name of orthodoxy. The bill and information were filed by F., the person who succeeded B. as minister of the congregation at W., and by a member of the congregation; the effect of the evidence was that the doctrines preached by the plaintiff F. were the same as those preached by B., and that the congregation was one of dissenting Christians who held the doctrine of the Trinity. It being objected that the gift was too vague to be carried into effect, the court held, that the minister for the time being of the congregation at which B. preached in the lifetime of the testatrix was entitled to the interest of the legacy so long as he preached the same doctrines as had been preached by B. in the lifetime of the testatrix (*d*).

A conditional bequest "to the fellows and demies of *Magdalen College, Oxford,*" upon the happening of a particular event, was held void for uncertainty, in consequence of the language of the condition and the description of the legatees being so loose and obscure, that the court was unable judicially to collect the intention of the testator with respect either to the individuals who were to take, or the time and manner of their taking (*e*).

In order to vacate a deed on the ground of obscurity in its meaning, the obscurity must be so great as to render it impossible to put such a construction upon it as will enable the court to carry it into execution.

Where a trust deed provided that a fund should accumulate with the interest arising thereon until the principal sums should amount to the sum of —— *l.* sterling, when it was to be applied to the building of an hospital and to the maintenance of —— boys, leaving blanks as to the amount of the accumulation, and as to the number of boys, it was held that the deed was void on the ground that it was too uncertain to be carried into execution, although it was admitted that the

(*d*) *Attorney General* v. *Mollard*, 1 Younge, 562.

(*e*) *Attorney General* v. *Sibthorpe*, 2 Russ. & M. 107.

gift would have been good if a discretion had been given to the trustees to begin to build as soon as they should have accumulated such a fund as they should think equal to the donor's purpose (*f*). But if the extent of the fund is ascertained, and power over it given to trustees, and the mode in which it is to be applied and managed is left to their discretion, the gift will be good. As where the residue of an estate was appointed to trustees in aid of the institutions for charitable and benevolent purposes established, or to be established, in the city of *Glasgow*, or neighbourhood thereof, in such manner and in such proportions of the principal or capital, or of the interest or annual proceeds of the sums to be appropriated, as to the trustees should seem proper; with an express declaration, that the trustees should be the sole judges of the appropriation of the residue for the purposes aforesaid (*g*).

(*f*) *Ewen* v. *Bannerman*, 2 Dow & Clark, 74; *S. C.* 4 Wils. & Shaw, 346.

(*g*) *Hill* v. *Burns*, cited 2 Dow & Clark, 101; *S. C.* 4 Wils. & Shaw, 359.

A decree was made against a corporation, to grant a new lease, according to a covenant for perpetual renewal, though the whole of the reserved rent had been, for many years, uniformly applied to one charitable purpose.

In 1710, the Corporation of *Grantham*, in consideration of upwards of 80*l.*, granted a lease of two messuages, for a term of 21 years, at a yearly rent of 4*l.*; and they covenanted to grant, at all times, and for ever, new leases for a like term, and at the same rent, on payment of a fine of 5*s.* The lease had been renewed, from time to time, until the year 1814; and the bill was filed by the person entitled to the benefit of the covenant, in order to compel the corporation to grant a renewed lease. The defence made by the corporation was, that the property had been devised to them on charitable uses, and that the covenant for perpetual renewal was a breach of trust.

The only evidence of the premises being subject to a charitable trust was, that the 4*l.* of yearly rent had been applied, since the year 1769, in purchasing four blue coats for four poor men of the town of *Grantham*. It was contended, that if the rents, so far back as the application of them could be clearly traced, had been applied uniformly to one and the same charitable purpose, it must be presumed, that they had

111—113. See Sir *F. Palgrave's* Protest, pp. 9, 10, 18, where it is stated that "instances of peculation, or the collusive disposal of corporate property, for the benefit, direct or indirect, of members of the ruling bodies, are rare, and few cases of such misappropriation have occurred of late years. Yet the law should prevent even the suspicion of such a gross abuse. And it is highly expedient that the management and disposal of corporate property should be regulated so as to prevent its application to any purposes except what are strictly municipal, and for the benefit of the town; and that in every case the accounts should be rendered to the main body of freemen, or others to be included in the municipal community, and for whom the ruling body, however elected, nominated, constituted, or appointed, ought to be considered as trustees. In the whole of their financial concerns, the city of London offers the best example to other corporations, and very particularly so in the self-denying ordinance, by which the members of the common council are prevented from deriving any profit from the corporate concerns."

always been so expended; and that an uniform application of the rents to one charitable purpose, was sufficient evidence that the property had been originally consecrated to charity. But Sir *John Leach*, M. R. decided that the evidence did not entitle him to presume, that the property was held in trust for a charity in 1710; and he, therefore, decreed a renewal of the lease with costs (*e*).

It is incident to every corporation, without any express clause in the charter of incorporation, to have and use a common seal; and in every case where they must act by deed, there they must use their common seal (*f*). Actual delivery of a deed made by a corporation is not required, for fixing the common seal is tantamount to delivery (*g*); but if the corporate body has given a letter of attorney to deliver the deed, it is not theirs before delivery (*h*). But the seal must be affixed with the intent to pass the estate, otherwise it operates no more than a feoffment without livery of seisin; as where the order of the corporation to affix the seal was accompanied with a direction to their clerk to retain the conveyance in his hands till accounts were adjusted with the purchaser (*i*). When an instrument purports to be under the seal of a corporation, it is not necessary to produce a witness who saw the seal affixed, it will be sufficient to show, that the seal is the official seal of the corporate body (*k*).

It is a general rule, that a corporation can neither dispose of nor bind their corporate property, except by deed under their common seal (*l*). Thus they cannot, without deed, make a lease for years, nor present to a benefice, nor grant a license to take their trees (*m*), nor authorise their bailiff to enter into certain lands of their lessee for years for a condi-

(*e*) *Gozna* v. *the Aldermen of Grantham*, 3 Russ. 261.

(*f*) 10 Rep. 30 b.

(*g*) Perkins, c. 2, s. 132; 2 Roll. Abr. 23, l. 50; Dav. Rep. 44.

(*h*) Co. Litt. 36 a. n. (5).

(*i*) *Derby Canal Company* v. *Wilmot*, 9 East, 360.

(*k*) *Moises* v. *Thornton*, 8 T. R. 307; 1 Esp. Rep. 53.

(*l*) Bro. Corp. 34, 50, 51; 1 P. Wms. 656; 3 Atk. 475; Bac. Abr. Corporations (E) 3.

(*m*) 12 Hen. VII. 25, 26; Bro. Corp. 34, 51; *Horn* v. *Ivy*, 1 Ventr. 471; 1 Kyd on Corp. 263.

tion broken (*n*), nor appoint a person to seize goods as a forfeiture to the corporation (*o*). A corporation aggregate cannot make an *actual* surrender of a lease, except by deed under their seal, but they may make a surrender in law, by accepting a new lease (*p*). Corporations may dispose of their lands to any individual member, because the capacity of a corporation, and its constituent members, as individuals, are distinct (*q*). But where a corporation consisted of two bailiffs and burgesses, and *one* of the bailiffs and the burgesses made a lease in their political capacity, to the other bailiff in his natural capacity, it was held void; for the bailiffs were an integral part of the corporation, and they both made but one officer (*r*).

It is a general rule, that a corporation can neither take nor grant, but by its proper name of incorporation, though every minute variation in the name is not so material as to avoid a grant (*s*).

The 6th section of 5 & 6 Will. IV. c. 76, provides, that after the first election of councillors in any borough, the body or reputed body corporate, named in the schedules thereto annexed, in connexion with such borough, shall take and bear the name of the "mayor, aldermen, and burgesses" of such borough; and that they and their successors, under that name, may perform all corporate acts.

It seems that if a regular corporate resolution has been passed for granting an interest in the corporate property, and upon the faith of it, expenditure has been incurred; the court will compel the corporation to make a legal grant in pursuance of the resolution, although it is not under the corporate seal (*t*).

(*n*) Roll. Abr. 514 (K); Cro. Eliz. 815; Cro. Jac. 411.

(*o*) 1 Ventr. 47; 1 Mod. 18; 3 P. Wms. 424.

(*p*) 10 Rep. 68 b.

(*q*) 1 Kyd on Corp. 180.

(*r*) *Salter* v. *Grosvenor*, 8 Mod. 303. See Dyer, 304; Cro. Jac. 234.

(*s*) 1 Kyd on Corp. 234—237. See *Mayor of Carlisle* v. *Blamire*, 8 East, 487, 492; Com. Dig. Capacity, B. 5. See *ante*, p. 516, n. (*u*).

(*t*) *Marshall* v. *Corporation of Queenborough*, 1 Sim. & Stu. 520. See 1 P. Wms. 656; 3 Atk. 476—478.

The stat. 5 & 6 Will. IV. c. 76, has provided new regulations for the application and disposition of property belonging to municipal corporations. By the 71st section of that act (*u*), in all boroughs where the corporate body or any part thereof, were at the time of the passing of that act trustees for charities, the individuals of the old body corporate are to continue such trustees until the 1st August, 1836, notwithstanding they may have previously ceased to hold office, and vacancies before that time may be supplied by the lord chancellor.

When the former body corporate of a borough, or any member thereof in his corporate capacity, were the sole trustees for the execution of any act of parliament, or of any trust *not relating to charities*, the present body corporate of the council shall be trustees for executing the same by their council (*v*). But where they were such trustees jointly with others, in that case, the council shall appoint a like number of its members to be trustees, instead of the members of the former corporate body at the time therein mentioned (*w*).

The trustees appointed by act of parliament, for paving, lighting, cleansing, &c. any borough, who are not personally, or as trustees for others, interested therein, may, if they think fit, transfer their trusts to the body corporate of the borough, who shall thereafter execute such trusts by their council (*x*).

The rents, profits, interest, &c. of the corporation property, and all fines for offences against the stat. 5 & 6 Will. IV. c. 76, are directed to be paid to the treasurer and carried to the account of the borough fund; which after payment of debts, interest, &c., is to be applied to the payment of the salaries of the mayor, recorder, police magistrate, town clerk, treasurer, and other officers—to the payment of the expenses of preparing and printing burgess lists, ward lists, notices, and other matters attending elections therein mentioned—to the payment of costs of prosecutions, the main-

(*u*) *Ante*, pp. 507, 508.
(*v*) 5 & 6 Will. IV. c. 76, s. 72.
(*w*) Id. ss. 73, 74.
(*x*) Id. s. 75.

tenance and punishment of offenders, maintaining gaols and corporate buildings, payment of constables, &c. If there be a surplus, it is directed to be applied for the public benefit of the inhabitants, and improvement of the borough; if the fund be insufficient, the deficiency is to be made up by a rate (*y*). The treasurer's accounts are directed to be open at all times to the inspection of the aldermen and councillors, to be audited twice in every year by the auditors of the borough, and an abstract of them to be yearly printed for the use of the rate-payers (*z*).

The council, under the act, are not enabled, without the authority of the lords of the treasury, to sell, or to lease corporate property for more than thirty-one years, except for building or improvement, where the lease may be for seventy-five years (*a*); or to mortgage or alienate the real property of the corporation, in the absence of any covenant, contract, or agreement *bonâ fide* made or entered into previous to the 5th June, 1835, or a resolution entered on the corporation books previous to that period; and in the leases which the council may make, there must be reserved such rents as to the council shall appear reasonable, without taking any fine for the same (*b*). Whenever the council may deem it expedient to sell, alienate, demise, or lease property for a longer time than thirty-one years, they may do so with the consent of the lords of the treasury on the terms approved by them, provided that notice of the intended application of the council for such purpose to the lords of the treasury, be fixed on the outer door of the town hall, or in some public situation within the borough, for one calendar month before such application, and a copy of the memorial intended to be sent to the lords of the treasury be kept in the town clerk's office during such calendar month, and be freely open to the inspection of every burgess (*c*).

The council possess the same power as before the passing

(*y*) 5 & 6 Will. IV. c. 76, s. 92.
(*z*) Id. s. 93.
(*a*) Id. s. 96.
(*b*) Id. s. 94.
(*c*) Id.

of the act to renew or grant leases for lives or years, in all cases in which the corporation, previously to the 5th of June, 1835, had been bound or engaged by any covenant or agreement, express or implied, or had been enjoined by any deed, will, or other document, or warranted by ancient usage or practice, to renew any lease for years or lives, at any fixed period, at a fine certain; or when they had, under any special or specific terms, made or renewed any lease, upon the payment of an arbitrary fine (*d*).

The council first to be elected in any borough, may call in question all purchases, sales, leases, and demises, not made in pursuance of a *bonâ fide* covenant, contract, or resolution, made before the 5th of June, 1835, and all dispositions of the real and personal estate, of which, on or before that day, the body corporate was seized or possessed, either in their own right, or as trustees for *charitable or other* purposes, which had been made by the former corporation, between the said 5th of June, and the day of the declaration of their election. And if there is ground for believing that any such disposition was collusively made for no consideration, or for an inadequate consideration, the council, within six calendar months after the first election of councillors, may call in question such dispositions, the validity of which is to be determined by a jury, in the manner prescribed by the act (*e*). If, however, any such body corporate were in their corporate capacity, and not as *charitable trustees*, seized of any manors or other hereditaments, whereunto any advowson or right of nomination or presentation is annexed, or of any advowson in gross, or any right of presentation to any ecclesiastical preferment, such advowson or presentation is directed to be sold, with the consent of the ecclesiastical commissioners, the produce to be vested in the public funds, and the interest yearly carried to the account of the borough fund (*f*).

(*d*) Id. s. 95.
(*e*) Id. s. 97.
(*f*) Id. s. 139.

SECTION II.

Of the Alienation of Estates belonging to Eleemosynary Corporations.

It does not come within the compass of this work to treat at large of the statutes restraining the alienation of property belonging to ecclesiastical persons (*g*); but it is necessary to advert to the subject for the purpose of introducing some cases immediately relating to charities.

The statute 13 Eliz. c. 10, s. 3, makes void all leases, gifts, grants, and conveyances, by any master and fellows of any college, dean and chapter of any cathedral, *master or guardian of any hospital*, parson or vicar, of any houses, lands, or other hereditaments belonging to any such body corporate, other than for the term of 21 years or three lives, from the time of granting such lease, whereupon the *accustomed yearly rent* or more, shall be reserved.

The statute 18 Eliz. c. 11, s. 2, declares that all leases within the statute 13 Eliz. c. 10, of any lands, &c. whereof any former lease for years is in being, and not to be expired, surrendered, or ended within three years next after the making of any such new lease, shall be void. By the 17th and 19th sections of the former act, leases of houses in any city, borough, town corporate, or market town, may be let for forty years, provided such houses be not the mansion houses of the lessors, nor have above ten acres of ground belonging to them, and provided that no lease of such houses be made in reversion, nor without reserving the accustomed rent at least, nor without charging the lessee with repairs.

The acceptance of a second good lease will operate as a surrender of the former; but the reason does not hold in the case of accepting a new *void* lease, or one that the lessee cannot enjoy. There is no inconsistency in the acceptance

(*g*) For the necessary information on this subject, see Bac. Abr. Leases, (E), (F), (G), (H). Chambers on Leases, 250—280.

of a new good lease being a surrender of the former; but the accepting a new void lease cannot show an intention to surrender the other, for a void contract for a thing which a man cannot enjoy, cannot in common sense and reason imply an agreement to give up a former contract (*h*).

The authority to let lands under the act, 13 Eliz. c. 10, is confined to lands which had been formerly letten, because the act expresses that the accustomed rent must have been reserved, and unless accustomably let, there can not be an accustomed rent (*i*).

The prohibition in the stat. 13 Eliz. c. 10, s. 3, extends to an ecclesiastical body, which is seized of a rectory as a trustee for a charitable purpose, as for the support and maintenance of a grammar school, and a covenant by such body to alien in fee, will not be more valid and effectual than an actual grant in fee (*j*).

By stat. 39 Eliz. c. 5, s.2, concerning the erection of hospitals and houses of correction (*k*), it is enacted, "that all leases, grants, conveyances or estates, to be made by any corporation to be founded under that act, exceeding the number of twenty-one years, and that in possession, and whereupon the accustomable yearly rent or more, by the greater part of twenty years next before the making of such lease, shall not be reserved and yearly payable, shall be void."

A lease by the warden and poor of an incorporated hospital, under the corporation seal, made before the expiration

(*h*) 4 Burr. 2213; *Lane's* case, 2 Rep. 17; *Roe* d. *Lord Berkeley* v. *Archbishop of York*, 6 East, 86. See Cro. Eliz. 564; 1 Dougl. 552; Poph. 9; Chambers on Leases, 192—197.

(*i*) *Doe* d. *Tennyson* v. *Lord Yarborough*, 7 Moore, 258; *S.C.* 1 Bing. 24. See *Bishop of Hereford* v. *Scory*, Cro. Eliz. 874.

(*j*) *Dean and Chapter of York* v. *Middleburgh*, 2 Younge & Jerv. 196; *ante*, p. 413.

Alexander, C. B., said, in this case, "It is difficult at this time to ascertain with precision what the nature of the master or guardian of an hospital was. Enough, however, appears that they were always of a charitable nature, in which the individual seized of the estate, might have, and no doubt often had, an interest, but not universally, nor necessarily, any personal interest. In the particular enactment (13 Eliz. c. 10, s. 3), the legislature has clearly protected charitable interests, and that to a great extent." Ibid. 216.

(*k*) *Ante*, pp. 43—45.

of a former lease to a lessee who then had only a part interest in the first lease, but to whom the entire interest was assigned within three years afterwards, was held to be binding upon the succeeding warden and poor of the hospital (*l*).

Spiritual persons and others restrained by the statutes of Elizabeth, have no power to make leases with covenants for renewal; so where an hospital or corporation is restrained by the terms of its constitution from granting leases for more than twenty-one years, it has no more power to enter into a binding covenant for perpetual renewal of the term, than originally to grant a lease exceeding the prescribed limits.

Where an hospital, which by the rules made on its foundation, was restrained from making any lease exceeding twenty-

(*l*) *Grumbell* v. *Roper*, 3 B. & Ald. 711. See 2 Y. & J. 216.

The hospital in this case was founded by virtue of letters patent in the 38th year of Eliz. or under the stat. 39 Eliz. c. 5, which passed before the actual creation or foundation of the hospital. By indenture dated the 27th October, 1796, the warden and poor of the hospital, in consideration of a surrender of a former lease (which would have expired on the 29th September, 1803,) and of a fine, demised certain premises to *Shore* and *Price*, from Michaelmas, 1796, for twenty-one years, at the yearly rent of 15*l*. At the time of granting this lease, the old lease was vested in *Shore*, *Price* and *Hood*, the latter of whom did not join in the surrender. By an indenture, dated the 23d February, 1804, the warden and poor, by their corporate description, in consideration of the surrender of a former lease theretofore granted to *Shore* and *Price*, and in consideration of a fine, demised the premises to *Irvine*, for twenty-one years from Michaelmas then last, at the yearly rent of 15*l*. *Irvine* then had the equitable interest in some shares of the property, and, in 1805, acquired the whole legal and equitable interest in the old lease. On a case directed by the Court of Chancery, whether the lease of the 23d February, 1804, would bind the succeeding warden and poor of the hospital, it was contended that such lease was void within the 13 Eliz. c. 10, and 18 Eliz. c. 11, the old lease not having expired nor been actually surrendered within three years after the making of the new lease. In favour of the lease it was contended, that it was not affected by those restraining statutes, but was valid within the stat. 39 Eliz. c. 5; and that the acceptance of the new lease in 1804 determined the one in possession. The judges of the Court of King's Bench certified, that the lease of the 24th Feb. 1804, would bind the succeeding warden and poor of the hospital, but the grounds of their decision do not appear.

one years, granted a lease for that term, a covenant to make it, by renewal, sixty years, was held not binding in equity, as being equally prejudicial to the hospital as a lease for sixty years (*m*).

A perpetual right of renewal upon particular terms would be equivalent to an alienation; and a bill to compel an hospital to renew a lease upon certain terms under two years' reserved rent, was dismissed (*n*).

In another case, a bill to enforce a perpetual renewal of a lease of lands belonging to an hospital was dismissed, although the claim was founded upon usage sanctioned by decrees of the Court of Chancery, but was not supported by the custom of the country, nor the contract, nor within the power of the hospital to grant, nor according to the true construction of the decrees (*o*).

Although the jurisdiction of the court, to give effect to an award confirmed by the decree of the court in the case of a charity, was considered doubtful; the renewal of a lease upon the terms of the award, having been twice directed by the court, was again enforced. It appeared that in 1712 an information was filed, at the instance of the hospital of *St. John*, and according to a practice prevailing at that time, instead of proceeding in the Court of Chancery with the information, all matters in dispute were referred to the then master of the rolls, who made an award which was afterwards confirmed by that court. It was ordered by the award, that the master of the hospital, with the consent of the brethren and sisters for the time being, might, under their common seal, from time to time, as any of the leases should be surrendered or determined upon the death or deaths of any life or lives, or upon the changing of any life or lives, grant new leases not exceeding three lives at the most, and to be nominated by the respective tenants, reserving the same rents as were thereby

(*m*) *Lydiatt & another* v. *Fouch*, 2 Vern. 410.

(*n*) *Somerville* v. *Chapman*, 1 Br. C.C. 61. See *Bettesworth* v. *Dean, &c. of St. Paul's*, 1 Br. P. C. 240, 2nd ed.

(*o*) *Watson* v. *The Master, &c. of Hemsworth Hospital*, 14 Ves. 324. See 2 Vern. 596; *Blackston* v. *Hemsworth Hospital*, Duke, 49 (644).

directed to be reserved; and that the fine to be taken on renewing such lease should not exceed one year's value for a life, according to a particular thereto annexed, adding interest for the time such renewal should be neglected by the tenant, to be computed from the end of six calendar months after the former life determined; and that the rents or fines should not be increased without the leave of the court. Upon the dropping of one of the lives named in the last lease, the hospital demanded a much larger fine than had been paid on the previous renewals; and a petition was presented, praying that the hospital might be ordered to accept a surrender of the existing lease, and to grant a new lease for the lives of the two remaining *cestuis que vie*, and of some other person, upon payment of the same fine as had been paid on several preceding renewals, or that the master might ascertain what fine ought to be paid for the renewal pursuant to the award and decree. As it appeared that Lord *Hardwicke* had, on two occasions, assumed jurisdiction in this charity upon petition, and that the property had been enjoyed under the award, Lord *Eldon* acted upon it, but thought that a larger fine, according to the increased value of the land, ought to be paid for the renewal; and it was referred to the master to ascertain the amount of the fine to be paid (*p*).

A college, seised in fee, was restrained by its constitution from making any lease, except for twenty-one years, at rack rent. The college made a lease accordingly, to A., who, having much improved the premises by building two houses, an entry was made thereof in the audit book, and a recommendation signed by the master-warden and most of the fellows, to grant A. a new lease at the expiration of the old term, at the same rent, and under the same covenants; and when the term had nearly expired, an order was made at another audit, for granting such new lease. On a bill by the administratrix of A. to compel the college to grant such lease. It was held that the contract for leasing by the master-warden and fellows, was not binding on the college, it not

(*p*) *Attorney General* v. *Clements*, Turn. & Russ. 58.

being under the college seal; for a contract to bind any corporation as to its revenues, must be under its common seal. Although there would have been some equity if the intestate had, after the order for a new lease, laid out money in improvements, in confidence and reliance on such order, yet even then reparation must have been obtained only from the private persons signing such order, and not from the college; and as the repairs done by the lessee after the order, were only such as he was bound to do by the old lease, the bill was dismissed with costs (*q*).

By 39 & 40 Geo. III. c. 41, where any part of the possessions of any ecclesiastical persons shall be demised by several leases, which was formerly demised by one, or where a part shall be demised for less than the ancient rent, and the residue shall be retained in the possession of the lessor, the several rents reserved in the separate demises of the specific parts, shall be taken to be the ancient rents; provided, that if the whole of such premises shall be demised in parts, the aggregate rents reserved shall not be less than the old accustomed rent; and so in proportion where a part shall be retained in possession by the lessor.

Incumbents of livings are enabled by statutes 17 Geo. III. c. 53, and 21 Geo. III. c. 66, to raise money by mortgage for repairing or building parsonage houses.

By stat. 55 Geo. III. c. 147, every incumbent of any ecclesiastical benefice is enabled to exchange parsonage houses and glebe lands, with the consent of the patron and bishop, for other houses and lands; and also to purchase lands to be annexed to such benefices as glebe land thereof; and by mortgage of their tithes, rents, and other profits, to raise money for such purchases.

The exchange of lands subject to trusts for charitable uses, for other lands, is authorised by stat. 1 & 2 Geo. IV. c. 92 (*r*).

The stat. 5 & 6 Will. IV. c. 30, for facilitating the exchange of lands lying in common fields, extends to ecclesiastical

(*q*) *Taylor* v. *Dullidge Hospital*, 1 P. Wms. 655.

(*r*) See Appendix.

persons or corporations, and to the trustees for charitable uses.

By 58 Geo. III. c. 45, s. 36, all bodies politic, corporations aggregate or sole, and trustees and feoffees in trust, may convey land for the sites of new churches and chapels; and by the 59 Geo. III. c. 134, s. 15, they are empowered to give up rights of patronage, or to enter into agreements relating thereto, with the commissioners for building new churches.

By stat. 3 Geo. IV. c. 72, s. 1, any corporation, or any trustees, guardians, commissioners or other persons, having the control, care or management of any hospitals, schools, charitable foundations, or other public institutions, by any conveyance signed by or under the seal of such body or corporation, may convey any hereditaments, and with the consent of the lord, enfranchise copyholds, to be used as sites for churches or chapels, or for church or chapel yards, or cemeteries, or for enlarging the same, or for parsonages or residences for ecclesiastical persons.

Long leases made under an unlimited power of leasing, given by the legislature to ecclesiastical persons, will not be set aside by a court of equity upon the principles applicable to the leases of charity estates. Thus, by a private act of parliament (*s*) the vicar of *Stockton-upon-Tees* was enabled, with the consent of the vestrymen of the parish for the time being, to demise certain lands to any person or persons whomsoever, for such terms of years, at such rents, reservations, or payments, as to him and them should seem meet; provided that the yearly rent so to be reserved, be the highest that could be got, and no fine be taken. The vicar and vestrymen granted various leases for 999 years, at rents making together an increase in the vicar's income of about 50*l.* a-year. Informations, seeking to set aside these leases after the lapse of a century, upon the ground that the vestrymen were to be considered in the nature of trustees, and therefore that the leases were subject to the same rules as those of charity estates, were dismissed, because mere length of time is not

(*s*) 1 Geo. I. st. 2, c. 24.

sufficient to set aside a lease made under a power of an unlimited kind, and without fraud (*t*).

SECTION III.

Of the Alienation of Estates belonging to Charities.

1. *Of Sales and Leases which have been held valid.*
2. *Of Leases which have been set aside,* p. 697.
3. *Of particular Directions by the Founder as to Leases,* p. 704.
4. *Of Underlessees claiming under Leases declared to be void,* p. 705.
5. *Of Persons incapable of taking Leases,* p. 707.
6. *Power of leasing Lands, given for the maintenance of Highways,* p. 708.
7. *Miscellaneous Points relating to Leases,* p. 709.
8. *Of the Alienation of Rights of Patronage,* p. 713.

1. *Of sales and leases which have been held valid.*] There is no positive law restraining the alienation of estates given for charitable purposes: the trustees in whom such estates are vested, may, at law, make an absolute disposition; but if it be improvident or injurious to the interests of the charity, the transaction will be set aside in a court of equity, as a breach of trust. The alienation of charity estates not improvident but beneficial to the charity, and conformable to the rule which ought to guide the trustees, may be good. The principle that governs all the cases is this, that the trustees are bound to a provident (*u*) administration of the

(*t*) *Attorney General* v. *Moses,* 2 Madd. 294. *Attorney General* v. *Wray,* Jac. Rep. 307.

(*u*) Lord *Brougham* said, "The very word *provident* which the law uses in decisions on this subject, shows by its own force, that you are to look forward, but not to look forward with an indefinite or prophetic eye, but in the way in which

fund for the benefit of the charity. There is no positive law, which says, that in no instance there shall be an absolute alienation; if that were the case, even if there should be a reference to a master, and a report by him that the alienation was proper, yet if the alienation were in itself illegal, no such proceeding could give it validity (*v*).

Although it is not usual for the court to direct the sale of a charity estate (*w*), yet alienation, not improvident, but beneficial to the charity, has been sometimes directed after it has been found on an inquiry under the order of the court, that the disposition of the property will be beneficial to the charity.

Thus, in a case where a house near *Lewes*, in *Sussex*, the property of a charity, which had formerly produced a large income by being let in apartments, had fallen into a state of dilapidation, which rendered it unproductive, and the charity had no funds to rebuild it, but the materials and site were of considerable value, on an information being filed, and the master having reported that it would be for the advantage of the charity to sell the house, Sir *W. Grant*, M. R., directed a sale (*x*).

a reasonable man, of common sagacity and prudence, might do. Such a man would adapt his conduct to the facts; would look at the facts and circumstances in which he lives, and at the result likely to happen from those facts and circumstances, as far as he could easily and with reasonable certainty decide on them. The complaint of abuse must not be, simply that he has not selected that mode by which the lease, if granted now, would be rendered most profitable."—*Attorney General* v. *Hungerford*, 2 Clark & Finn. 377.

(*v*) 2 Swanst. 302; 1 Wils. C. C. 411.

(*w*) *Attorney General* v. *Buller*, Jac. Rep. 412.

(*x*) Case cited in *Attorney General* v. *Warren*, 2 Swanst. 300—302.

In the *Attorney General* v. *Brickdale and others*, 29th January, 1830, an inquiry as to the expediency of selling property belonging to a charity was directed to be made by the master, who having reported in favour of a sale, the court directed on the 19th June, 1832, three contracts for sale, into which the trustees had entered conditionally, to be completed; and the trustees were ordered to convey to the purchasers, after payment of the purchase money into the bank. Reg. lib. A., 1831, fol. 2425-6.

In the *Attorney General* v. *Warren* (*y*), an impropriate rectory and glebe lands had been devised to trustees, for payment of annuities to the preacher and schoolmaster at *Chesterfield*, and to the master and fellows of *Jesus* and *Magdalen Colleges, Cambridge*, and to apply the residue of the rents towards the relief of the poor of *Chesterfield*. By a decree of the Court of Chancery in 1670, in a suit between the owner of a manor and lands, subject to tithes, and the trustees of the charity, and all the persons interested in the due application of the funds, to which the attorney general was not a party, an agreement between the owner of such manor and lands, subject to the payment of tithes, and the trustees of the charity, for granting a lease of the tithes for 980 years, at a fixed pecuniary rent, and an exchange of lands, was directed to be performed. The conveyances were accordingly made for securing 60*l.* a-year to the trustees of the charity, in lieu of tithes, and the trustees demised the rectory and tithes for the term of 980 years. The rent reserved had been constantly paid, and the lands enjoyed according to the decree. An information, praying that the lease might be declared illegal and void, and for an account of tithes, but not setting forth the decree of 1670, nor impeaching it for fraud, was dismissed, as the agreement had been carried into effect by the decree of the court. It was said by Sir *T. Plumer*, M. R., that in reviewing a contract, the court cannot look at one part of it, and disregard the rest. It would be necessary to examine the whole transaction, and consider whether, taken altogether, it was an improvident contract.

Length of time, though not a bar, is certainly an obstacle in the way of setting aside a contract made near a hundred and fifty years ago, and acted upon ever since, till the filing of the information (*z*). It creates a difficulty in ascertaining all the circumstances under which the agreement was made, and a strong case is required to justify the interposition of equity after such a lapse of time, at the instance of one of

(*y*) 2 Swanst. 291; 1 Wils. C. C. 738.

Attorney General v. *Pembroke Hall*, 2 Sim. & Stu. 441; *ante*, p. 601.

(*z*) See 2 Clark & Finn. 378;

the parties, who may have enjoyed all the benefit of the contract for perhaps the whole, or a great part of the interval, and who never could have been compelled, at the instance of the other party, to relinquish it, when from an alteration in the relative value of money, the agreement has become disadvantageous to him. It is additionally difficult, in such a case, partially to set aside the contract, leaving the charity still to enjoy all the benefits of the other part of the transaction, where the information is not framed for restoring both parties to their original rights.

The principal feature in this case was, that the contract had been submitted to, and sanctioned by, the court, before it had been executed; and there was no ground for supposing that on that occasion, there was any omission fairly to disclose to the court the nature of the contract, which must be presumed to have been proper, after having been established by decree. The decree could not be impeached for fraud, unless the fraud had been put in issue. As to the attorney general not having been a party to the decree, it was said that he has no interest; his office is, to see that those who have the legal estate duly administer the property; but he would be no party to a conveyance, the legal estate being in the trustees, who are competent to convey. It would, indeed, have been more fit had he been a party to the suit; but if not, is the decree a nullity, and to be totally laid aside, the information not seeking to impeach it on that ground? The court, therefore, refused to overthrow a positive decree not impeached by the record, and pronounced directly on the contract in question (*z*).

In the *Attorney General* v. *Brooke* (*a*), Lord *Eldon* said that it is impossible to contend in the Court of Chancery that trustees of a charity can make a lease with covenants for perpetual renewal. Lord *Thurlow* frequently said, that contract should never have been performed between man and

(*z*) *Attorney General* v. *Warren*, 2 Swanst. 291; *S. C.* 1 Wils. C. C. 387. See *Attorney General* v. *Hungerford*, 2 Clark & Finn. 357; *post*, p. 692—694.

(*a*) 18 Ves. 326.

man (*b*); but that trustees of a charity estate can part with that estate for ever, for a consideration not shown to be an equivalent for the inheritance, is a proposition generally not to be endured.

Some cases, however, have occurred where leases of charity estates, with covenants for renewal, have been sustained, which show that it cannot be maintained as an inflexible proposition, that no permanent interest can be given by the trustees of a charity without incurring a breach of trust. Thus where it appeared on a reference to the master, that the property of a charity which had got into the hands of patentees, as concealed land, had been recovered in a great degree by the activity of the party seeking a permanent interest in it. Lord *Coventry* decreed, that he should have a lease for ninety-nine years, determinable on three lives, at one-third part of the then improved value, and to be renewed from time to time for ever. Lord *Cowper* afterwards held that the lessee was entitled to the benefit of the agreement for renewal, but declared that the fine should be a third of the *real improved* value at the time of the renewal of the lease, from time to time (*c*). But it seems that the court would have great difficulty in sanctioning the absolute alienation of charity estates upon such a principle at the present day (*d*).

So where an application was made to set aside the lease of a charity estate, with a clause in the original lease for nine successive renewals, at the end of every seven years, a fine to be paid at each time; and if the lease could not be set

(*b*) Lord *Eldon* disavowed such doctrine, on the ground that it was so sanctioned by decision that it would be infinitely too dangerous to interpose a new rule. *Willan* v. *Willan*, 16 Ves. 84.

(*c*) *Attorney General* v. *Smith*, 2 Vern. 746.

(*d*) 2 Swanst. 303.

Sir *W. Grant*, M. R., remarked upon this case, "I do not inquire by what authority Lord *Coventry* gave to an individual so large an interest in the charity estate. To the great seal, as superintending all property destined to charitable uses, powers might be supposed to belong, beyond those which it would be competent for me, sitting in a mere judicial capacity, to exercise." 14 Ves. 334.

aside, to be relieved against the covenant for renewal; the court thought that there was not sufficient ground for setting aside the lease altogether, for there was no particular mode prescribed for leasing, and the trustees were only obliged to lease beneficially for the charity. There had been a decree in the matter of the charity, which directed a particular mode of leasing; the first lease had been made pursuant to this mode in every respect, except in the insertion of a covenant for perpetual renewal, which the trustees afterwards reduced to nine renewals, of which five remained at the time the suit was instituted. The lessees having made considerable improvements, the court directed an allowance to be made to them; and said, that if the five remaining renewals were no more than a reasonable satisfaction for the improvements, the lessees must have the benefit of them. The master was directed to inquire what lasting improvements had been made and money laid out, and how much the annual value of the charity had been increased by the lessees, and what was the just and real value of the lease, when first granted in 1694, to be then purchased, consideration being had to the continuance and renewals, in order that it might appear whether the lessees had received sufficient satisfaction or not. In this case no favour was shown to the lessees on the score of want of notice, for the lease recited the previous decree in the matter of the charity, and the decree recited the will under which the trustees claimed, and by which the trusts were created (*e*).

The principles laid down in *The Attorney General* v. *Warren* (*f*), were adopted by Lord *Brougham*, in a case where, at the time a lease was granted of a charity estate in *Ireland*, it appeared to have been the usual practice of landlords, in dealing with large estates in that country to grant leases for lives, with covenants for perpetual renewal, on payment of a fine on each renewal, besides a certain rent; the validity of a lease made by the trustees of a charity upon

(*e*) *Attorney General* v. *Baliol College, Oxford*, 9 Mod. 407, 5th ed.

(*f*) *Ante*, pp. 689, 690.

those terms, which were reasonable at the time, was held not to be affected by a subsequent alteration of circumstances.

By deed, dated in 1703, certain estates were conveyed to trustees in fee, upon trust to employ and dispose of the rents towards the purchasing a convenient place for a school, and for erecting the necessary buildings; and, after the completion of the school, and other necessary buildings, the rents were to be applied in payment of certain allowances, pensions, and salaries for the support of the school. Governors of the school, and of its revenues, were appointed, with the necessary powers. In 1710, the trustees, in consideration of a fine of 300*l.*, demised part of the property for three lives, at a yearly rent of 100*l.*, and covenanted to renew the lease, on the death of any life, upon the payment of a fine of 25*l.* for every new life. In 1782, the lease was renewed for three lives. In 1828, an information was filed, alleging, that the two leases had been made in violation of the trusts of the charity; and that the school and charitable establishments must remain entirely useless, if the leases were allowed to stand, and be perpetually renewed; and praying that the two leases might be decreed to be void, for an account of rents, for the appointment of new governors, and that the lands might be let for proper terms of years, at a full and fair value. The information was dismissed by the lord chancellor of *Ireland*, and upon appeal to the House of Lords, that decree was affirmed. Lord *Brougham* thought that the original lease was not granted at an undervalue; and with respect to the duration of the term, he said that he was not sure it is law founded upon either principle, or statute, or on authority to lay down the proposition, that all leases such as this, that all perpetuities such as this, even that all alienations, if it can be said that the lease in question amounts to an alienation, are, therefore, as such, void or voidable. There is no warrant of principle for holding that; each case must depend upon its peculiar circumstances. His lordship conceived a case, where even an alienation might be fit; not only justifiable, not only harmless, as

regards the breach of trust by the trustees, but might be a fit course for them to adopt. And he put a case where trustees would not do their duty to the charity, if they did not alienate part of the land, as in the instance of an extravagant price, much exceeding the real value, being offered for a small piece of land, or an outlying estate, on account of its peculiar situation; the question, in all these cases, being, whether or not there has been a provident or improvident management of the charitable fund. It appeared to have been the practice in *Ireland* to grant leases upon lives with covenants for perpetual renewal, and his lordship was of opinion, that regard being had to the circumstances of the times, and to the usual practice of landlords in dealing with large estates in that country at the time the lease was granted, that it was not so improvident, even in the case of charity property, as to lead to the conclusion that an abuse had taken place (*g*).

The court refused to set aside a lease granted for ninety-nine years, determinable on three lives, at a small rent, and on payment of a fine, where it appeared that the corporation, who were the trustees of the charity, had been always in the habit of letting their estates according to the same mode, which was also supported by the custom of the country in which the estates were situate; and where the evidence did not bear out the charge of undervalue. In this case, Sir *Wm. Grant*, M. R., said, "The leases, which it is the object of this information to set aside, are impeached on two grounds; first, as being of improper length; secondly, as having been made for an inadequate consideration.

"First, they are leases for three lives; or, which comes to the same thing, for ninety-nine years, determinable on lives; and this, it is said, is of itself sufficient to induce the court to set them aside. But, to set them aside, it is necessary to assume, that the corporation has been guilty of a breach of trust in making, and that the lessee has made himself accessary to that breach of trust, in accepting, such leases. Now,

(*g*) *Attorney General* v. *Hungerford*, 2 Clark & Finn. 357.

though the expediency of letting charity estates in this manner may be more or less questionable, according to the nature of the charity, and the circumstances and situation of the estate, I am not aware of any principle, or authority, on which it can be held, that such a lease is, on the very face of it, an abuse of trust. The legislature has, both in enabling and disabling statutes (*h*), considered leases for three lives as on a footing with leases for twenty-one years absolute. So have many founders of charities, who prohibited the letting on leases for more than three lives or twenty-one years. It would be a strong thing to say, that, in such a case, a lease for three lives would be void. Supposing, however, that where charity estates had usually been let for twenty-one years, it would be considered as improper to substitute a letting for lives, it does not follow that we can impute abuse to a mere adherence to the ancient and uniform mode of letting, especially when it is a mode usual in the district in which the estates are situated. In laying down prospective rules for the regulation of a charity, it may be very fit to consider which mode is best calculated to answer the particular purposes of such charity. In some cases it may be expedient to take fines, in others to let at the best annual rent (*i*). In order to set aside such a lease already existing, it is not enough to say, that the mode of letting is not the best that might be prescribed, because on such a point there may be a great difference of opinion among the most experienced; but you must show that the mode is *so positively bad*, that no persons meaning fairly to

(*h*) 32 Hen. VIII. c. 28; 1 Eliz. c. 19; 13 Eliz. c. 10; *ante*, p. 680.

(*i*) Where the leases of estates belonging to a charity had expired, Lord *Hardwicke* said, as to letting the estates for the future, one consideration is, whether it should be let for the improved rent, or fines directed to be taken: it was left to the master to inquire, whether letting on improved rent, or leasing upon fines, would be for the benefit of the charity, since a great deal depended upon the custom of the country. The leases were directed to be to the best bidder; and whether upon fines, or the improved rack rent, proper covenants were to be inserted, for the tenants to keep the houses in repair, and to pay all the charges of such repairs. *Attorney General* v. *Price*, (*Berkhampstead School*) 3 Atk. 108.

discharge their trust would have resorted to it. This may be said of a lease for a long term of years absolute, at a stationary rent; because no man of a reasonable degree of providence would so let his own estate. But many landowners do still let their estates upon leases for lives; and formerly, the general usage in *Devonshire* (where the estate in question was situated) was to let in that manner. As to the charge in the bill, that proper covenants have not been inserted in the lease, I see no evidence in support of it. The assertion, that there is no covenant to repair, turns out to be a mistake; no witness says, that there is any covenant wanting, that is usually inserted in leases for lives."

As to the second point, that the estates had been let for an insufficient consideration, his honour admitted that leases of charity estates may be set aside on the mere ground of undervalue, but it must be satisfactorily proved, and considerable in amount. It is not enough to show, that a little more might have been got for the estate than was actually reserved. Still less is it sufficient to infer the underletting from the value of the property at some subsequent period, particularly where the lessors have taken the precaution of having the lands surveyed and valued by an experienced surveyor, upon whose estimate the fine was set. In this case, witnesses had made an estimate in the year 1816, of the value of the estate in 1801, according to which much larger fines ought to have been paid.

But the court would not allow the evidence as to value of witnesses stating opinions formed upon a loose recollection of circumstances at a distant period, to be put in competition with that of surveyors actually employed at the time of letting, for the purpose of ascertaining what fine ought to be paid on the renewal, who could have no motive for undervaluing the land, and whose skill or integrity was not in any way impeached. The information was therefore dismissed without costs (*j*).

The Court of Chancery refused to grant an injunction to

(*j*) *Attorney General* v. *Cross*, 3 Mer. 524, 542.

restrain the governors of the *Foundling Hospital*, which is established by charter and act of parliament, from proceeding with contracts for letting the fields around the hospital on building leases, as it did not appear that they were violating their trust, and it seemed probable that the intended buildings would be beneficial to the charity (*k*).

2. *Of leases which have been set aside.*] It is very difficult to lay down any abstract proposition as to the propriety or impropriety of the mode of granting leases of the estates of charities, or the duration of the term, but each case must depend in a great measure upon the particular circumstances, bearing in mind that the benefit of the charity should be the primary object regarded by the trustees. It is said, that trustees of a charity, under a general power of leasing, may, both in law and equity, either take fines, or reserve rents, as is most beneficial to the charity (*l*). Trustees of charity estates having the absolute legal estate, may grant leases for any number of years; but if they are unreasonably long, without any circumstances showing that they were made in the fair management of the estate, and for the benefit of the charity, they will be set aside by the Court of Chancery, as a breach of trust. A mere husbandry lease for a term of ninety-nine years, upon terms adapted to a lease for twenty-one years, and at rents not improvable nor capable of increase during the whole of the former term (*m*), and a building lease for the term of 999, upon terms adapted to a lease for ninety-nine years, have been considered breaches of trust, and accordingly decreed to be delivered up (*n*). Covenants for perpetual renewal of leases of charity estates are void (*o*).

From the earliest times, leases granted by the trustees of a charity at an undervalue, have been rescinded, or the lessee

(*k*) *Attorney General* v. *Governors of Foundling Hospital*, 2 Ves. 42.

(*l*) *Attorney General* v. *Corporation of Stamford*, 2 Swanst. 592.

(*m*) *Attorney General* v. *Owen*, 10 Ves. 555; *Attorney General* v. *Lord Hotham*, Turn. & Russ. 209.

(*n*) *Attorney General* v. *Green*, 6 Ves. 452; *Attorney General* v. *Griffith*, 13 Ves. 565.

(*o*) *Attorney General* v. *Brooke*, 18 Ves. 319; *ante*, p. 690.

ordered to pay an increased rent (*p*). One of the resolutions in the case of *Eltham Parish* v. *Warreyn* (*q*) is, "that the lease being made at an undervalue, is a breach of trust, and fraud to deprive the charitable use of the true value of the land; and the commissioners may decree the lease to be void and surrendered; and that the lessee shall pay the true profits of the value of the charitable use, above the rent reserved." Originally, the length of the term granted, was not sufficient to rescind the alienation if made for an adequate consideration at the time, although, in modern times, a long lease of a charity estate, without reference to the value at the time it was granted, will be deemed an improvident alienation (*r*).

A lease, granted in the year 1715, of an estate, let at 31*l.* a-year, having upon it buildings considerably out of repair, for the term of 999 years, at a rent of 35*l.* a-year, with an agreement that the tenant should expend 500*l.* in building, was set aside; the annual value of the property at the time of the information, being about 100*l.*

Lord *Eldon* said, it is impossible that a person, taking in good faith, would accept such a lease, which was, in effect, a purchase of the perpetuity, for the increased rent of 4*l.* and the sum to be expended. The difficulty is, how to give a person, not taking in good faith, the benefit of that situation which would be given a trustee laying out money for the benefit of the charity, and desiring, for his own benefit that sort of interest in the charity fund, that would secure him the repayment. The result of an inquiry in this case, having for its object the securing the lessee that benefit, would be to show that he is already paid. He must have credit for having paid the original and additional rent. He cannot have credit against the charity for having expended more than 500*l.*, for it would be much too dangerous to inquire by the evidence of persons making valuations now,

(*p*) *The Poor of Yeovil* v. *Sutton*, Duke, 43 (628); *Wright* v. *The School of Newport Pond*, Duke, 46 (649); *Smith* v. *Stowel*, 1 Ch. Cas. 195; *Reresby* v. *Farrer*, 2 Vern. 414.

(*q*) Duke, 67 (641); *ante*, p. 285.

(*r*) 6 Ves. 452; 10 Ves. 555.

and speculating upon the price of buildings in 1715, and the possible value of what they may conceive (for they cannot know anything) as to the value of the old materials upon the premises. It is safer, therefore, to proceed upon the evidence the deed furnishes, concluding that the trustees called on the original tenant to lay out not less than 500*l.* and to say that it is all he ought to be allowed under the circumstances of the present case, to have laid out. If so, he must have 25*l.* a-year interest upon the 500*l.*, since the expenditure, which, with the rent, would be 59*l.* a-year; then this interest being satisfied by that rent, the question upon the inquiry would be, whether the 500*l.* must not be satisfied now, by the excess of the rent beyond the 59*l.* a-year, which would yield about 30*l.* a-year to sink the principal, and that would be entirely sunk in thirteen years. His lordship said, that he must either order the defendant to deliver up the lease without any allowance, or direct the inquiry whether the principal of the 500*l.* had been paid (beyond the rent reserved and the interest of 500*l.*). It having been then stated that large sums had been expended on the buildings, beyond the 500*l.*, besides 100*l.* recently, an inquiry was directed with the consent of the relators (without costs), on the defendant's undertaking to deliver up the lease to be cancelled, and to account for the rents and profits during the time he had been in possession (*s*).

In order to support a lease of a charity estate, for a long term of years, the court will require it to be shown, both by the trustees and by the lessee taking under them, that the lease was reasonable, and made in the fair management of the estate; and the court will not permit an alienation for ninety-nine years of a charity estate for purposes of husbandry to stand, unless it be shown by those who make and accept the lease, that it was fair and reasonable, and for the benefit of the charity (*t*).

(*s*) *Attorney General* v. *Green*, 6 Ves. 452.

(*t*) *Attorney General* v. *Owen*, 10 Ves. 555. In this case, the trustees of a charity estate, which was near *Bir-*

A husbandry lease of lands belonging to a charity, for ninety-nine years, at an uniform rent, cannot be sustained unless some satisfactory reason can be given in its favour; and the fact of a lease for ninety-nine years having been substituted for one of twenty-one years, without any agreement being made for an increase of rent, according to the change of circumstances, or any obligation being imposed upon the tenant to lay out any money upon the estate, was held to be quite conclusive against the lease (*u*).

It is a settled principle, that trustees for charities, and those to whom they give derivative interests, and who are also trustees of those interests, derived to them through a breach of trust by the former trustees, act under an obligation to use reasonable providence in the execution of the trust; and the proposition, that in general it is reasonable providence to make a lease at a rent not increasing in seventy years, an interest, the value of which, is not very far short of the value of the inheritance, and no other consideration than a rent admitted to be adequate at the commencement, is of such a nature, as at least not to exclude the power of the

mingham, in the year 1747 demised to *B. Owen*, his executors, &c. a farm, with a dwelling-house and other buildings, &c., with an exception of the wood and underwood, for the term of ninety-nine years, at the annual rent of 32*l.* and the tenant agreed to lay out 40*l.* on the buildings.

In 1801, the information was filed by the trustees against the personal representatives of the lessee, who died in 1753, on the ground that the trustees had been guilty of a breach of trust, praying that the defendant might be directed to surrender the lease, offering to grant him a new lease for a reasonable term, at a fair and proper rent; and that the defendant might be decreed to pay an additional rent for the time past. The court decided that the lease was to be given up immediately, but the defendant undertaking to do so, he was not charged with costs, nor with any rent beyond the 32*l.* a-year for any period prior to the filing of the bill. But Lord *Eldon* observed, that the case was not to be considered as an authority with reference to persons taking such leases of charity estates, and, in future, they would not get off so easily.

(*u*) *Attorney General* v. *Lord Hotham*, Turn. & Russ. 209.

court to call upon those who are concerned, to show that this *primâ facie* most improvident lease, is reasonable; and the duty of explanation lies upon them (*v*).

The case of the *Attorney General* v. *Wilson* (*w*), is distinguished from the other cases, by the circumstance of the trustees taking a beneficial interest, for the lands were given to the master and ushers of a school in trust for the maintenance of the school. The leases complained of were granted by the former master and usher for twenty-one years at very low rents, inadequate to the support of the school. Sir *W. Grant*, M. R., made a decree setting aside the leases, observing, the short duration of the term was immaterial, and the only distinction of this from the late cases was, that in

(*v*) Lord *Eldon* in *Attorney General* v. *Griffith*, 13 Ves. 575.

In this case, by an indenture dated 28th June, in 16 Car. II., the trustees of charity estates restrained by the founder from granting any leases exceeding twenty-one years, or three lives in possession, in consideration of 500*l.*, to be expended by the lessee in building and improving, and of his releasing his title to some of the property, demised certain premises in the parishes of Chelsea, Kensington, and St. Margaret's, Westminster, for the term of seventy years, at the yearly rent of 130*l.* By another lease dated the 8th May, 1750, all the premises contained in the former lease were demised to *W. Bucknall*, for the term of twenty-one years, at the yearly rent of 170*l.* for the first ten years, and 200*l.* during the remainder of the term, with only the usual covenants for keeping in repair. The sum of 748*l.* being in arrear for rent, the trustees in consideration of the payment of that sum, and of the surrender of the former lease, granted a new lease, dated 24th June, 1760, to *Bucknall* and his son, for the term of seventy years, at the yearly rent of 151*l.*, with the usual covenants. On an information, stating that in 1760, the premises were worth to be let at a rent of 402*l.*, and that the sum of 900*l.* was then paid by the under lessees, and charging that the lease of 1760 was obtained by fraud, and ought to be set aside without prejudice to the underleases, relief was granted against the lease on the ground that the trustees had not given due attention to the interests of the charity, the last lease having been granted in consideration of no increase of rent, nor previous expenditure, nor covenant for improvement. The account was directed from the time of filing the information, or a previous demand, if any appeared. *Attorney General* v. *Griffith*, 13 Ves. 565.

(*w*) 18 Ves. 519.

those, the lessors were mere trustees, and in this instance they had also a beneficial interest; but such leases were not to be encouraged on account of the inconvenience both ways, the trustees not doing their duty, and the lessees getting the land at a low rent.

It has, however, been stated as the opinion of Lord *Eldon*, in a case where an agreement for a lease for fourteen years was sought to be set aside, that a tenant is not necessarily to be turned out, who has obtained a lease of a charity estate at too low a rent, with reference to the actual value, if it appear that he has acted fairly and honestly. The only ground for so dealing with him, would be some evidence or presumption of collusion, or corrupt motive. The circumstance of the tenant being a relation of the trustee, would create suspicion. In the case of a charity, however, beyond all others, the security of the rent is the first object to be regarded; and therefore, in such cases, the inadequacy of the rent reserved, is less a badge of fraud, than it would be in almost any other instance (*x*).

In a recent case for the establishment of a charity, and the due administration thereof, and for setting aside a lease granted on a fine at a small rent, and for an injunction to restrain the trustees from granting similar leases of the other parts of the charity property; it was declared that the leases of the charity estates ought not to be renewed before the expiration thereof; and that all leases to be granted by the trustees of the charity ought to be at fair rack rents, and not upon fines; and for leases not exceeding twenty-one years in possession (*y*).

Several leases have been set aside on informations filed by the attorney general, at the instance of the commissioners of charities (*z*).

(*x*) *Ex parte Skinner, in re Lawford Charity*, 2 Mer. 457.

(*y*) *Attorney General* v. *Gutch*, Reg. lib. A. 1830, fol. 2720.

(*z*) *Attorney General* v. *Dean of York and others*, 4th Rep. of Commissioners of Charities, p. 35, decree 21 May, 1824; *Attorney General* v. *Earl of Lonsdale*, 3 Rep. 5, decree 24 Jan. 1827, setting aside a coal lease granted in 1742, and directing payment of 5000*l.* for rent of coals, to

The court, in setting aside a lease, improperly granted by the trustees of a charity, in which they covenanted with the lessee for the actual enjoyment of the demised premises, will order the indenture of demise to be cancelled *in toto*, and will not leave the personal covenants of the trustees in force for the benefit of the lessee (*a*).

A lease, good at law, will not be set aside in equity, without allowing for lasting improvements; for where the lease is good at law, but bad in equity, the attorney general seeking equity, must do equity (*b*). Where a lease was granted, in 1800, of lands which appeared on the face of the lease to belong to a free school, for the term of thirty years, for 40*l.* a-year, and the tenant immediately underlet for 80*l.* a-year, and subsequently for 120*l.* a-year; in a suit against the trustee and the original lessee, the lease was ordered to be delivered up to be cancelled, and the lessee was charged with the rents received by him when the estate was underlet, and with the annual value by way of rent, during his own occupation; but the defendant was to be allowed what he had paid on account of rent, and "all sums properly paid or expended in repairs of the school, and in substantial improvements of the said trust property" (*c*). But no allowance can be made for payments by which the charity has not been benefited; for instance, the purchase money paid by the assignee of the lease (*d*). And where the purchaser's title is equally bad at law and in equity, it seems doubtful whether any compensation will be made for money expended in buildings (*e*).

the filing of the information; *Attorney General* v. *Scott and others*, 6 Rep. 365, decree 26 April, 1825; *Attorney General* v. *Sedgwick*, 4 Rep. 35, decree 9 Feb. 1826; *Attorney General* v. *Ward*, 10 Rep. 307, decree 17 March, 1829, setting aside a reversionary lease of 500 years.

(*a*) *Attorney General* v. *Morgan*, 2 Russ. 306. See *Northcote* v. *Underhill*, 1 Salk. 199.

(*b*) *Attorney General* v. *Baliol College, Oxford*, 9 Mod. 411, 5th ed.; *ante*, p. 692; *Attorney General* v. *Lloyd*, 6 Madd. 92; *Pugh* v. *Ryal*, Sel. Cas. Ch. 41.

(*c*) *Attorney General* v. *Ingilby*, 5th June, 1823.

(*d*) *Attorney General* v. *Brooke*, 16 Ves. 236, 496.

(*e*) *Attorney General* v. *Lloyd*, 6 Madd. 92.

3. *Of particular directions by the founder as to leases.*] Where charity estates are directed by the founder to be leased for twenty-one years, the court has no authority to order a lease to be granted for ninety-nine years. Where the master, under a reference, had reported in favour of leases for terms of ninety-nine years, instead of twenty-one years, as required by the will, Sir *L. Shadwell*, V. C., in confirming the report made on a reference by his predecessor, said, that he would not take such a lease under the order of any court of equity; and that an act of parliament was necessary to render legal such a deviation from the founder's intention (*f*).

In a case where the trustees were restrained by the founder from granting leases exceeding twenty-one years, or for three lives in possession, Lord *Eldon* said, a lease made under a power, by a person having only a particular estate, if not conformable to the power, is bad; but where the persons granting the lease have at law the inheritance, with directions only how they are to execute leases, the legal estate will pass from them, although such directions are not observed (*g*).

A direction by the founder of a charity, that the rents of the estates shall not be raised, will not be followed, but the rent must be regulated according to change of times and value (*h*).

A testatrix in a will devising estates to a college, and by rules for regulating the gift referred to in the will, directed the rents to continue the same as at the time of her decease, and the leases not to be made for a longer term than eleven years. On this clause Lord *Eldon* observed, one question is, whether the testatrix meant, that the rents should continue the same during the lives of the then tenants, or that the rents should never be raised. If it was her intention that the rents should not be raised during the lives of the then tenants, that would be to give the difference to the tenants for the time being; but if she meant that the rents should for ever continue the same, she gave a direction which was

(*f*) *Attorney General* v. *Mayor of Rochester*, 2 Sim. 34.

(*g*) *Attorney General* v. *Griffith*, 2 Vern. 596.

13 Ves. 580.

(*h*) *Watson* v. *Hinsworth Hospital*,

inconsistent with the legal devise of the estate, and the court has often held, that it cannot give effect to such words; and such sort of clause is inoperative (*i*).

Where the master and usher of a free grammar-school had power under an act of parliament, of granting leases for thirty-one years, or three lives, subject to waste, reserving the usual rent or more, the court expressed an opinion that it had authority to control the power of leasing in the master and usher, if it should appear for the benefit of the charity not to act on such power, for in this case the leases were not to be granted for the benefit only of the master and usher, but a proportion of the rent and fines was given for the benefit of the poor of the parish (*j*).

4. *How far underleases will be affected where the original leases are declared to be void.*] The relief to be granted in these cases against persons taking under the original lessee, is to be adapted to the conduct of the parties, as the court finds them respectively to have acted fairly or not towards the trust; and the title of underlessees who have contracted *bonâ fide*, before the institution of the suit, will not be disturbed.

In a case for setting aside a lease where it appeared that some of the parties stood in the character of purchasers, Lord *Eldon* said, although a purchaser of a lease has never been considered as a purchaser for valuable consideration, without notice to the extent of not being bound to know from whom the lessor derived his title, it seems that no case has gone the length that he is bound to take notice of all the circumstances under which the lessor derived that title. And although underlessees of a charity estate must be presumed at least to have notice, that the lessors were trustees of a charity, yet it will not follow that they had notice of the lease being bad, as that depends upon a number of circumstances *dehors* the lease (*k*).

(*i*) *Attorney General* v. *the Master of Catherine Hall, Cambridge*, Jac. Rep. 381, 395; *ante*, pp. 571—575.

(*j*) *Ex parte Berkhampstead Free School*, 2 Ves. & B. 134, 138.

(*k*) *Attorney General* v. *Backhouse*, 17 Ves. 293.

Where a lessee of a charity estate grants an underlease for a fair consideration, and the original lease is set aside, the court will not disturb the possession of the sublessee, but transfer the interest acquired under the bargain for the benefit of the charity, and the decree will be modified by directing the sublessees to pay their rents to the charity, instead of the persons with whom they contracted (*l*). And where the original leases are set aside, without disturbing the underleases, the persons representing the original lessees will be directed to assign all their interest to the trustees of the charity, in order that it may have the benefit of the underleases (*m*).

A lease will not always be set aside, merely on the ground of the length of the term, unless it be unreasonable to such a degree that the court may infer that it was fraudulent. Thus where a lease was granted for eighty years, in consideration of the surrender of a former lease, the terms of which did not appear, and the renewed lease had been in existence, thirty-five years, and the lessee had granted an underlease of part of the property, to a person who had expended money in building substantial houses. An inquiry was directed, whether the lease to the original lessee, in 1775, was upon reasonable terms, having regard to the rent reserved, the money expended in building or otherwise, and the duration of the lease; and if it should appear to the master not to be upon reasonable terms, that he should state particularly the ground of such opinion, to the intent that the court might judge whether the lessee ought to be permitted to hold against the charity. An inquiry was directed as to the buildings, &c., and it was declared, that the court did not think proper, under the circumstances, to disturb the subdemise to or from the underlessee; reserving the consideration, whether the charity was to have the benefit thereof (*n*).

A lease of two houses having been granted for a term of thirty-eight years, at the rent of 30*l. per annum*, for each

(*l*) *Attorney General* v. *Backhouse*, 13 Ves. 581. 17 Ves. 292.

(*m*) *Attorney General* v. *Griffith*, 17 Ves. 283.

(*n*) *Attorney General* v. *Backhouse*,

house, the least valuable of which was underlet at the rent of 50*l.* a-year, and on payment of a premium of 960*l.*, and subsequently assigned at a premium. On an information filed to set aside the leases, on the ground of great undervalue, and for an account of the benefit derived from the underlease. There appearing to be no foundation for the imputation of fraud, and the increased value being ascribed, not to the intrinsic value, but to the good-will of the trade established in one of the houses, and the money laid out in repairs, a reference was directed to the master, to inquire whether the rent reserved for the two houses, was fair and adequate; and in considering the value of the premiums received for the underlease, the master was to distinguish how much resulted from the good-will, and the repairs, after the lessee's renewal, and how much from the value of the lease above the rent reserved by the lessors (*o*).

5. *Persons incapable of taking leases of charity estates.*] Trustees and agents are generally prohibited by the rules of equity, from becoming the purchasers of property, with the management of which they are intrusted (*p*); and even the circumstance that the lessee is a relation or connexion of the trustee or agent, is sufficient to excite suspicion (*q*).

A trustee of a charity estate cannot be tenant, and the court will charge him with an occupier's rack rent, and order him to quit the premises.

Where the heir-at-law of the founder of a charity had obtained the management of the estates of the charity, and procured leases for the benefit of his family, at low rent, and on payment of a small fine, an inquiry was directed, whether the rent was fair, and it was declared that any lease of the charity estate, as far as it should appear to be for the personal benefit of the grantor, or his representatives, or any of his children, or any persons other than those entitled to the

(*o*) *Attorney General* v. *Magwood*, 18 Ves. 315.

(*p*) See Sugd. V. & P. chap. xiv. s. 2.

(*q*) *Pugh* v. *Ryal*, Sel. Cas. Ch. 40. *Ex parte Skinner, in re Lawford*, 2 Mer. 457.

benefit of the charity, was an abuse in the application of the charity funds (*r*).

The court, with the view of guarding against possible fraud, adopts the general rule of not allowing a governor of a charity, whose duty it is to let at the greatest possible advantage, to take a lease. Therefore, a governor, who has taken such lease, will be ordered to deliver up the possession of the premises, and charged with the full value of it, should it appear that the rent he has paid fell short of the actual value (*s*).

It seems that trustees of a charity are not justified in stipulating for a collateral advantage to themselves; thus a covenant in a lease for the lessees to grind at the mill of the trustees, was held improper (*t*).

6. *Power of leasing lands given for the maintenance of highways.*] By 13 Geo. III. c. 78, s. 51, it was enacted, that where any lands had been or should be given for the maintenance of causeways, pavements, highways and bridges, all such persons who were or should be enfeoffed or trusted with any such lands, should let them to farm at the most improved yearly value without fine; and that the justices of the peace in open sessions should inquire by such ways and means as they should think fitting, into the value of all such lands so given or to be given, and order the improvement and employment of the rents and profits thereof, according to the will and direction of the donor of such lands, if they found that the persons so intrusted had been negligent or faulty in the performance or trust (except such lands had been given for the uses aforesaid, to any college or hall in either of the universities of this kingdom, which had visitors of their own).

By the 50 section of stat. 5 & 6 Will. IV. c. 50 (which repeals the last statute), it is enacted, "that when any lands

(*r*) *Attorney General* v. *Dixie*, 13 Ves. 540, 541.

(*s*) *Attorney General* v. *Earl of Clarendon*, 17 Ves. 500.

(*t*) *Attorney General* v. *Mayor of Stamford*, 2 Swanst. 592.

or tenements have been or shall be given for maintenance of highways, the profits and proceeds of which are to be applied and disposed of for no other use, intent, or purpose whatsoever, all persons who are or shall be enfeoffed or trusted with any such lands or tenements, shall, and they are thereby authorized and required to let them to farm at the most improved yearly value, without fine, for any term not exceeding ninety-nine years; provided nevertheless, that previous to the granting of such lease, the consent of the justices at a special sessions for the highways, neither of such justices being interested therein, by writing under their hands, shall be obtained as to the amount of the rent to be received [*reserved*], and the duration of the term" (*u*).

7. *Miscellaneous points relating to tenants of charity estates.*] The court will order the production of documents in aid of a suit instituted for the purpose of setting aside leases. Thus a defendant was ordered to produce a settlement, admitted by him to be in his possession, which affected long leases which had been granted of a charity estate (*v*). So the lessees of a charity estate were ordered, in a similar suit, to produce a case and an opinion of counsel upon it, which had been taken many years before, for the mutual benefit of both parties respecting their rights to the property in question (*w*). It has, however, been held, that a party has a right to the production of such deeds only as either sustain his own title exclusively, or sustain it jointly with that of his adversary; and that a party is not compellable to produce for the purposes of

(*u*) By the 93 sect. of 5 & 6 Will. IV. c. 50, it is enacted, that the powers and provision in that act contained, with respect to the widening and enlarging, diverting, turning, or stopping up any highway, shall be applicable to all highways which any person, bodies politic or corporate, is or are bound to repair, by reason of any grant, tenure, limitation or appointment of any charitable gift, or otherwise howsoever.

(*v*) *Attorney General* v. *Ellison*, 4 Sim. 236. See *ante*, p. 453.

(*w*) *Attorney General* v. *Berkeley*, 2 Jac. & Walk. 291. See *Radcliffe* v. *Davey*, 3 Br. P. C. 538, 2nd ed.; 18 Ves. 472; *The Princess of Wales* v. *Lord Liverpool*, 1 Swanst. 114, 580; *Preston* v. *Carr*, 1 Younge & Jerv. 175.

an action or suit, cases laid before counsel in the progress of a cause, and prepared in contemplation of such action or suit (*x*).

It is a well established principle in the relation between landlord and tenant, that a tenant, so long as he retains possession, cannot dispute the title of the landlord from whom he received possession; for there is an implied covenant that the landlord shall protect the tenant's enjoyment, and that the tenant shall guard the landlord's title. A tenant wishing to dispute the landlord's title, should give up possession (*y*). This principle is adopted by courts of equity; and therefore, on an information for setting aside a lease of charity lands, it was held, that the lessees were estopped from disputing the title of the persons under whom they held, and that if they intended to dispute it they ought to have given up possession (*z*).

The right of a parish to lands, was held to be conclusively established, although no conveyance was produced, where it was proved, principally by a series of entries in parish books, that the lands in question had, for 110 years, been uniformly dealt with as the separate property of the parish, and had from time to time been let by the inhabitants of the parish assembled in vestry, and that the rents of such lands had been received by the churchwardens and overseers of the parish, and applied in the repairs of the church, in the maintenance of the poor, and in other parochial purposes in aid of the rates. For such possession, whatever might have been its origin, coupled with the circumstance that the party who claimed in opposition had laid by 110 years without making any objection, was decisive of the right,

(*x*) *Bolton* v. *Corporation of Liverpool*, 1 Coop. Rep. Lord *Brougham's* Judgments, 19. See *Hughes* v. *Biddulph*, 4 Russ. 190.

(*y*) *Cowtan* v. *Williams*, 9 Ves. 107; *East India Company* v. *Edwards*, 18 Ves. 378; *Smith* v. *Target*, 2 Anstr. 531; *Homan* v. *Moore*, 4 Price 7; *Fleming* v. *Gooding*, 4 M. & Scott, 455; *S. C.* 10 Bing. 549; see *Wood* v. *Day*, 1 B. Moore, 389; *S. C.* 7 Taunt. 646; *Rogers* v. *Pitcher*, 6 Taunt. 202; *S. C.* 1 Marsh. 541.

(*z*) *Attorney General* v. *Lord Hotham*, 1 Turn. & Russ. 209.

and raised a presumption that the lands had been originally granted to trustees for the benefit of the parish. And although commissioners under an inclosure act, who had no jurisdiction to determine with respect to the title to the lands in question, had allotted them to the defendants who claimed against the parish, the decision of such commissioners was a nullity, and binding on no party (*a*).

A recital in an old lease granted by a corporation, that the rents of an estate were applicable to charitable purposes, was held sufficient to establish that fact, in opposition to the corporation, who insisted that the rents were applicable to their common use, or as they should direct (*b*).

A declaration of uses by the founder of a charity was presumed from an entry in an ancient book in the year 1659, purporting to be such declaration, but without signature or date, the book having been kept by the trustees of the charity for entering their proceedings, and containing an order by the trustees six years after the creation of the trust, that the declaration of the founder be there entered as a direction to the trustees (*c*).

In an ejectment brought upon the joint demise of several trustees of a charity, it was held not be sufficient for the defendant, who had paid one entire rent to the common clerk of the trustees, to show that the trustees were appointed at different times, as evidence that they were tenants in common; for, as against the defendant, his payment of the entire rent to the common agent of the trustees, at all events, was sufficient to support a joint demise, without making them show their title more precisely (*d*).

A majority of the trustees of a meeting-house may bring an action of ejectment in the names of the whole body (*e*).

(*a*) *Attorney General* v. *Lord Hotham*, Turn. & Russ. 209; *S. C.* 3 Russ. 413.

(*b*) *Attorney General* v. *Lord Gower*, 9 Mod. 224, 5th ed.; *S. C.* Barnard. 145, 152.

(*c*) *Attorney General* v. *Boultbee*, 2 Ves. jun. 380.

(*d*) *Doe* d. *Clarke* v. *Grant*, 12 East, 221. See *Doe* d. *Marsack* v. *Read*, Ibid. 57.

(*e*) *Doe* d. *Dupleix* v. *Roe*, 1 Anstr. 86.

A lessee, unless restrained by the terms of the lease, is entitled to cut down timber sufficient for repairs; but the lessee must apply such trees in repairs, and, consequently, he is not at liberty to sell the trees and apply the produce to the same purpose, such sale being waste (*f*).

In an early case, where a lessee of charity lands had cut down timber growing thereon and used part in repairs, and sold the rest, it was resolved, "that the cutting down of the trees was a waste, for which the lessee should pay damages, according to the value of them; and bestowing but part upon the house, not being able to prove the quantity, it was a fraud in him, to colour his disposing the residue otherwise; but if he had bestowed all, or the greatest part of the trees in the repair, it had been no waste" (*g*).

The purchaser of a reversion, subject to a term of years, but not without impeachment of waste, created for the benefit of a charity, has no right to enter upon the lands to cut timber; and if allowed to do so by the trustees of the charity, it is a breach of trust, in respect whereof compensation must be made to the charity (*h*).

The trustees of a charity, in whom the inheritance of an estate is vested, are not subject to the rules, with respect to cutting timber, which apply to persons having particular interests in estates. The trustees have a discretion upon the subject which must be exercised fairly, and in such a manner as the provident administration of the estate requires.

Lands in *Surrey* and *Hertford* were granted to trustees and their heirs, in trust, out of the rents and profits, to raise and pay certain annual sums for the benefit of the rector and scholars of *Exeter College*, and to pay the residue after taxes, *charges of repairs, &c.* deducted, yearly among the vicars, for the time being, of four parishes therein named, for the augmentation of their respective livings; they, the said vicars, to collect the rents and account with the trustees,

(*f*) Co. Litt. 53 b; *Lee* v. *Alston*, 1 Ves. jun. 78; *Gower* v. *Eyre*, Coop. C. C. 154; Godb. 28; *Maleverer* v. *Spinke*, Dyer, 35 b.

(*g*) *Inhabitants of Eltham* v. *Warreyn*, Duke, 67, 123 (641).

(*h*) *Bays* v. *Bird*, 2 P. Wms. 397.

to view the estates, and take care that the same were kept in good repair by the tenants; with a declaration, that it should not be lawful for the trustees, during forty years, to cut timber, except such as should be wanted for the necessary repairs of mills, &c., and other appurtenances belonging to the estates, and except such young slabs and tillers in the woods in *Hertford*, as should be necessary for selling the underwood; and after the expiration of the forty years, then that the trustees should have power to cut as they should think fit, and pay the produce to the said rector, &c. of *Exeter College*, as a fund for the augmentation of the library. It was held on an information being filed by that college that by the deed, the estates were given as one fund for the benefit of two distinct institutions—the whole to be managed for the benefit of both, in a due course of provident ownership; that the trustees were not restrained, after the expiration of the forty years, from cutting timber for the purposes of repairs; nor from cutting timber in one part of the estates for repairs in another part; nor from selling timber when cut, and applying the produce in necessary repairs, so long only as they cut no more timber on the whole property than the repairs on the whole property required; and that the power of cutting young slabs and tillers still continued, with the qualification annexed (*i*).

8. *Of the alienation of rights of patronage.*] There are several instances in which the patronage of schools originally reserved to an individual and his heirs, has been aliened and enjoyed by the alienee (*j*).

The patronage of the grammar-school of *Wotton-under-Edge*, was granted by letters-patent of James I. to Lord *Berkeley*, and the heirs of his body, and in default of such issue, to the lord of the manor of *Wotton-under-Edge*, for the time being. Lord *Berkeley* granted the patronage to a person named *Smith*, and his heirs; and in a suit afterwards

(*i*) *Attorney General* v. *Geary*, 3 Mer. 513.

(*j*) See Carlisle's Endowed Grammar Schools, Vol. I. p. 857, Vol. II. pp. 299, 316.

instituted in chancery, respecting the charity generally, to which Lord *Berkeley* was a party, it was decreed, that the heir of *Smith*, who claimed by virtue of the alienation, was entitled to the patronage (*k*).

In the case of the *Attorney General* v. *the Master of Brentwood School* (*l*), Sir *John Leach*, M. R., thought it questionable whether a personal trust of such a nature as the *patronage* of the school could be the subject of alienation, and accordingly directed a case upon that point for the opinion of the Court of King's Bench.

By the letters-patent founding the school (*m*), it was granted to "Sir *A. Browne*, (the founder,) and *Joan*, his wife, and the heirs of the said A. B.; that the said A. B. during his life, and after his decease the said *Joan* (if she should survive) during her lifetime, and after their decease, the heirs of the said A. B. and the heirs of the same heirs should be undoubted patrons of the said school, and that the said school should be altogether of the patronage and free disposition of the said A. B. during his life, and after his decease, of the said *Joan* during her life, and after the decease of the said *Joan*, of the heirs of the said A. B. as aforesaid; and that all and singular the schoolmasters of the said school should be named and perfected by the free disposition of the said A. B. during his life, and after his decease, by the said *Joan* during her life, and after their decease, by the free disposition of the heirs of the said A. B., and the heirs of the same heirs, by deed sealed for ever; and that every schoolmaster so named and perfected, should hold the said school without any other presentation, institution, or investiture to be therefore made for the term of his life." The guardians of the school were to be perfected by the like nomination and disposition of the said respective parties, and to be removable only at the will of the patron of the school for the time being, according to the orders and statutes. The letters-patent further declared, that the said school should be altogether donative and collative,

(*k*) See 17th Report of Commissioners of Charities, 341—347.

(*l*) 1 Mylne & Keen, 393, 394.

(*m*) *Ante*, pp. 621—623

and not presentative; yet that if the school be deficient of a schoolmaster or guardian for two months, and the patron should be informed of it, and should have been remiss in making the proper nomination, and should not have named a fit person for the space of another month, it should be lawful for the bishop of *London* for the time being, within one month next following, to constitute and perfect a fit person to be schoolmaster or guardian, for that time only.

The right of patronage had been the subject of several conveyances, and in 1752, the manor of *Southweald*, "the patronage and right of placing the schoolmaster in *Brentwood* school, and the gift and power of placing poor people in the almshouses," were conveyed to an ancestor of the party who exercised the rights of patron at the institution of the suit. The right was claimed either under the above conveyance, or as appurtenant to the above manor, which had always been held by the persons exercising the rights of patronage.

It was contended, that the patronage of the school could not be aliened, and several cases were cited for showing, that the right of foundership is incapable of alienation (*n*).

The Court of King's Bench certified their opinion, that the right of appointing the master of the said grammar school, and the wardens of the lands, tenements, and possessions of the same school, vested in the heirs of *A. Browne*, the founder of the said school, by the said letters-patent, and was in point of law, capable of alienation (*o*).

It is laid down by Sir *F. Moore*, "that an advowson in gross, a way or passage, matters of pleasure, as license to hunt in a park, a seignory *pro* fealty only, &c., cannot be granted to a charitable use; but they may be released to a charitable use, or sold, and the money provenient, disposed

(*n*) *Magdalen College* case, 11 Rep. 77 a, 78 a; *Englefield's* case, 7 Rep. 13 a; Moore, 322; Co. Litt. 99 a; Br. Abr. Corodies, 5; Case of *Earldom of Oxford*, Sir W. Jones, 123; *Attorney General* v. *Rigby*, 3 P. Wms. 145.

(*o*) *Attorney General* v. *The Master, &c. of Brentwood School*, 3 B. & Adol. 59—77. In *King* v. *Bayley*, 1 B. & Adol. 761, it was held, that a prebend might be aliened and annexed to an archdeaconry.

to a charitable use." Although an advowson may be granted upon condition, that so often as the church shall be void, a poor scholar of a particular college shall be preferred (*p*).

It was held in a recent case, that an advowson may be the subject of a charitable gift, but that the Court of Chancery would not permit the trustees to present, without making such profit of the presentation, as is allowed by law (*q*).

By the 6th section of the statute of 9 Geo. IV. c. 94, for rendering valid bonds, covenants, and other assurances for the resignation of ecclesiastical preferments in certain specified cases, it is declared, that the act shall not extend to any case where the presentation, collation, or gift, shall be made by any company or any *feoffees* or *trustees* for *charitable* or other public purposes, or by any other persons not entitled to the patronage of such spiritual office as private property (*r*).

(*p*) Duke, 142 (137).

(*q*) *Attorney General* v. *Ward*, 7 Law Journ. Chanc. 119.

(*r*) See Shelford's Real. Prop. Stat. 174—177, 3rd ed.

CHAPTER VII.

OF THE APPOINTMENT AND REMOVAL OF PERSONS CONNECTED WITH ELEEMOSYNARY FOUNDATIONS AND CHARITIES.

SECT. I.—*Of College Elections.*
II.—*Of the Election of Curates and Chaplains by Inhabitants.*
III.—*Of the Appointment and Removal of Schoolmasters.*
IV.—*Of the Appointment and Removal of Trustees generally.*
V.—*Of the Appointment and Removal of Ministers and Trustees of Dissenters' Establishments.*
VI.—*Of the Nomination of Objects by Trustees.*

SECTION I.

Of College Elections.

THE questions relating to the election and amotion of the members of colleges, which are usually decided by the visitors appointed by the respective founders, have already been considered (*a*). It remains, however, to notice generally some cases upon that subject, which have been decided by the lord chancellor as visitor in right of the crown, and other visitors, and which turn upon the construction of the particular statutes of colleges.

The stat. 33 Hen. VIII. c. 27, after reciting, that by the common law, all assents, elections, and grants, by the dean, warden, provost, master, president, or other governor of any college or other corporation, with the assent of the majority,

(*a*) *Ante*, pp. 330—397.

are as effectual as if the whole had assented; declares that every statute made by the founder of any such corporation, whereby the grant or election of the head, with the consent of the majority, is liable to be hindered by any one or more being in the minority, shall be void. The major part must be present, and the consent of each must be given at a regular assembly (*b*). This statute extends only to acts that concern the whole corporation; therefore, if the statutes of a college require a license for absence to be by the wardens, three bursars, five deans, and five senior fellows, the majority is not sufficient, but all must concur (*c*).

The statute 31 Eliz. c. 6, to secure the election of the fittest persons, renders void the elections of fellows, scholars, and other persons, into colleges, schools, hospitals, and the like societies, obtained by money, fee, reward, or other profit.

On a question whether a fellow of a college could be elected to fill the office of senior bursar, without the concurrent voice of the master, under the statutes of the college, which ordered that he should be elected "*per præsidentem et majorem partem sociorum*," it was held that such phrase had reference to the individuals by whom the election was to be made, and that the concurrence of the president was necessary in such election. And under the words of another statute, relating to the election of fellows (*d*), the phrase "*præsidens et major pars sociorum omnium tam præsentium quam absentium*," was held not to denote the body by whom the election was to be made as a body; for if these words denoted the body by whom the election was to be made, and not the individuals who were to concur in the election, it would follow, that if the president assembled with the greater number of the existing fellows, and then proceeded to the election, the majority of those who were thus assembled, would be sufficient to constitute a valid election. But

(*b*) Gibs. Cod. 744.

(*c*) Dyer, 247; Com. Dig. Franchises, (F. 11). See 1 Bl. Com. 478; Cowp. 377.

(*d*) "Et in quem præsidens et major pars sociorum omnium tam præsentium quam absentium consenserit, pro electo habeatur; quem sic electum præsidens teneatur pronuntiare et admittere."

as it was clear, from a subsequent part of the statute, that such an election would not be valid, unless the persons concurring in the election constituted a majority of the whole number of existing fellows; it was held, that those words referred to the individuals by whom the election was to be made, and that the president was a necessary party concurring in the election (*e*).

The statutes of *Clare Hall, Cambridge*, provide that "the election of a fellow shall be by the master and the major part of the fellows present;" it was held, that a valid election might be made without the concurrent voice of the master (*f*).

In *Caius College, Cambridge*, the election of a fellow is to be by the master and major part of the fellows; it was held, that an election by the major part of the persons entitled to vote in the election was valid, though the master refused to concur with them (*g*).

In *Catherine Hall, Cambridge*, where the election of fellows is to be "*communi omnium assensu aut saltem ex consensu magistri et majoris partis communitatis*," it was held, that the concurrent voice or consent of the master of the college present at an election, was necessary to the election of a fellow thereof (*h*).

Where the statutes of a college directed that the president, on his election, should be admitted, and prescribed an oath to be taken by him, and some other ceremonies to be performed; it was held, upon evidence of a particular form of admission, besides the oath and ceremonies mentioned in the statutes having been used, and upon the ground, that in such offices the admission is generally a distinct act, that the admission did not consist in taking the oath, and going through the ceremonies mentioned in the statutes, but in the observance of that particular form. It was also held,

(*e*) *In re Queen's College, Cambridge*, 5 Russ. 64.

(*f*) Case of *Clare Hall*, 5 Russ. 73 n.

(*g*) Case of *Gonville's and Caius College*, 5 Russ. 76 n.

(*h*) Case of *Catherine Hall*, 5 Russ. 85 n.

that the president elect did not therefore forfeit his office by taking the oaths and going through those ceremonies, without having previously subscribed the declaration required by the act of uniformity (*i*).

The effect of the act of uniformity, in the case of a party neglecting to subscribe, is to render his office void without a judicial sentence. And it seems, where the fellows of a college are required to elect a president within a certain time after a vacancy, that if the elected president neglects to subscribe the declaration of conformity before his admission, his office is, *ipso facto*, void, and a new election must take place within the time prescribed by the statutes (*j*).

In college statutes, making the possession of property a disqualification, real estate alone is in general considered. But when real estate is required as a qualification for certain offices by college statutes, the modern doctrines of equity are not to be too rigidly applied in determining what is real; and, therefore, an interest in land which in a court of equity would be deemed personal estate, may satisfy the statute (*k*).

A qualification in the grant of a living, that the person to be presented should not, at such time as the church should be void, "be presented, instituted, or inducted into any other living," was held to be complied with by the previous resignation of another living. A resignation of a living, sent by the post to the bishop, who endorsed and signed a memorandum of his acceptance, was sufficient, though not a public act (*l*).

It was held, that the trustees of a charity, after having accepted the resignation of a fellow on a foundation requiring him to travel, who had not complied with the condition imposed by the donor's will, could not compel the fellow to refund the salary which he had received, although it might

(*i*) Case of *Queen's College*, Jac. Rep. 45, 46.

Rep. 1; see Stat. 13 & 14 Car. II. c. 4, s. 10; 1 W. & M. c. 8.

(*j*) Case of *Queen's College*, Jac.

(*k*) *S. C.* ibid. 37, 38.

(*l*) *Heyes* v. *Exeter College, Oxford*, 12 Ves. 336.

have been otherwise, if the trustees had refused to accept the resignation, and required the fellow to comply with the terms of the gift or refund (*m*).

SECTION II.

Of the Election of Curates and Chaplains by Inhabitants.

It is a general rule of law, that no person can be authorised to preach publicly within a chapel, to which all the inhabitants of a district may have a right to resort, without the consent of the clergyman to whom the cure of souls is given; but this rule only applies to a chapel, open to all the inhabitants of a certain district, and not to one belonging to a private individual, where service is performed for the convenience of his family and friends; for the appointment of a chaplain by the owner of such a chapel, does not confer any freehold interest, but merely a permission to enter.

But where there has been an endowment of a chapel beyond legal memory, and the nomination has gone in a particular course, it will be presumed to have gone according to the will of the founder; and in the case of prescription, every thing necessary to give effect to that which has for so long a period been done, as the consent of the rector or vicar, and of the patron and ordinary, will be presumed (*n*).

Consent to such an agreement will be sufficient without any compensation to the incumbent, where nothing is taken from his income. It is also a rule of law, that wherever a chapel of ease is erected, the incumbent of the mother church is entitled to nominate the minister, unless there be a special agreement to the contrary, to which parson, patron, and ordinary are parties (*o*).

(*m*) *Attorney General* v. *Stephens*, 1 Atk. 358; *S. C.* 2 Eq. Abr. 196, pl. 17.

(*n*) *Farnworth* v. *Bishop of Chester*, 4 Barn. & Cr. 568; *S. C.* 7 Dowl. & R. 96.

(*o*) *Dixon* v. *Kershaw*, Ambl. 528; *S. C. nom. Dixon* v. *Metcalfe*, 2 Eden, 360, cited 4 B. & C. 368.

The parishioners of a parish, who obtained from a dean and chapter the grant of land for a burial ground, and who obtained a royal license, and afterwards built a chapel at their own expense, were held to be entitled to the right of nominating the minister, as the dean and chapter had not reserved any power of nomination (*p*).

In 1631, A. M. founded a chapel of ease in a township of a parish, and endowed it with lands for the maintenance of a minister, and by his will directed, that his son should, during his life, have the nomination and election of the minister, and might by will or deed, set down the order or course for the nomination and election of the minister after his death; and if he should not set down any course or order, then the minister should be nominated and elected by all the householders and heads of families in the township, and the heirs male of A. M.'s body, and such other of his kindred or blood, as should have any land in the township, or the greater number of them, with the advice of some godly ministers near adjoining.

By the instrument of consecration by the bishop of the diocese, all tithes, fees, and emoluments whatsoever on burials, marriages, &c., were reserved to the vicar of the parish. The son not having set down any order as to the election, it was held, that the householders and heads of families of the township, where the chapel was situate, had no right to present a curate to the chapel without the consent of the vicar of the parish (*q*).

The major part of a certain number of persons who are incorporated, may do any corporate act, although it is not so provided by the charter. By charter of Edward VI., twelve persons were incorporated by name, to elect a chaplain for the church of *Kirton* in Lincolnshire; and by another clause, three of the twelve were to choose a chaplain to officiate in the church of *Sandford*, within the parish of *Kirton*, with

(*p*) *Herbert* v. *Dean and Chapter of Westminster*, 1 P. Wms. 773; but see 4 B. & C. 569, 571.

(*q*) *Farnworth and others* v. *Bishop of Chester and others*, 4 B. & Cr. 555; *S. C.* 7 Dowl. & R. 96.

the consent and approbation of the major part of the inhabitants of *Sandford*. Upon a vacancy, two of the three chose a chaplain, with the consent of the major part of the inhabitants of *Sandford*, the third dissented. The common construction of charters being, that wherever a certain number are incorporated, a major part of them may do any corporate act, and that where all are summoned and part appear, a major part of those appearing may do a corporate act, though nothing be mentioned in the charter of the major part; Lord *Hardwicke* was of opinion, that the three were a corporation for the purpose for which they were appointed, and that the major part of them might do any corporate act; that the election of the chaplain was a corporate act, and being confirmed, it was not necessary that all should join, nor that it should be under the corporation seal; but if the act to be done by a select number of the twelve, had been by a different charter, it would have been otherwise (*r*).

Where twenty-five trustees had been appointed, by a former decree, for electing a minister of a parish, and during the vacancy of two trustees, an information was filed, respecting the election of two candidates, which was declared void, Lord *Hardwicke* directed two meetings of the trustees to be held, the first to fill up the number of trustees to twenty-five, and to appoint a subsequent meeting, and give notice thereof in writing, to all the trustees; and, in order to secure regular elections in future, the trustee named first in such deed of trust, was directed, within fourteen days after an avoidance, to send notice of the meeting to every one of the other trustees (*s*).

Where, by neglect, the number of trustees in a trust to present to a living, was not filled up at the time of an avoidance, the court would not by injunction prevent the effect of a presentation, under the legal title of the heir of the surviving trustee, without a special ground, as considerable time might be required in filling up the number of trustees, by which

(*r*) *Attorney General* v. *Davy*, 2 Atk. 212.

(*s*) *Attorney General* v. *Scott*, 1 Ves. sen. 419; *ante*, pp. 350, 351.

a lapse might be incurred; although the court will take care, as to the future, that the trust shall be properly filled up (*t*).

A direction that trustees, in whom the perpetual right of patronage of a vicarage was vested, should present, upon every vacancy, such fit clerk as the inhabitants and parishioners should nominate, vests the right of election in such inhabitants and parishioners, of the age of twenty-one years, as pay to church and poor rates (*u*).

The rectory impropriate of *Clerkenwell* was purchased for the use of the parishioners and inhabitants, and the nomination of the curate had been, by a decree of the Court of Chancery, declared to be in the parishioners and inhabitants paying the rates and assessments to the church and poor (*v*), But an election was considered valid, founded on a subsequent regulation, made by the common consent of the inhabitants at a public meeting, which provided that in future elections every person *assessed*, whether he paid or not, should vote, unless legally discharged (*w*). For it was held, that inhabitants and parishioners who have the right of nominating a curate, may, by common consent, bind themselves as to a particular mode of election (*x*).

The election of a vicar by parishioners, where an advowson is vested in trustees for the former, must be by votes openly taken; for an election by *ballot* is illegal and void (*y*). And Lord *Eldon* was of opinion that Jews, but not Roman Catholics, were entitled to vote at such an election (*z*).

The nomination to a perpetual curacy may be made by

(*t*) *Attorney General* v. *Bishop of Litchfield*, 5 Ves. 825. In this case the devise was of a rectory to eight trustees in fee, in trust to present a preacher, and the three last surviving trustees were directed to make choice of new trustees, to be added to them successively, to present.

(*u*) *Fearon* v. *Webb*, 14 Ves. 13.

(*v*) *Attorney General* v. *Rutter*, 2 Russ. 101 n.

(*w*) *Attorney General* v. *Forster*, 10 Ves. 335; *Attorney General* v. *Newcombe*, 14 Ves. 1.

(*x*) *Attorney General* v. *Newcombe*, 14 Ves. 10.

(*y*) *Edenborough* v. *Archbishop of Canterbury*, 2 Russ. 93. See *Faulkner* v. *Elzer*, 6 Dowl. & R. 517; 4 B. & C. 449.

(*z*) 2 Russ. 111, n.; *ante*, p. 107.

parol, and give an interest for life, unless the party be deprived by the ordinary (*a*).

A bill, and not an information in the attorney general's name, is the proper mode of proceeding for establishing the right of nomination to a perpetual curacy; but the augmentations of vicarages or curacies have been declared to be charities by stat. 29 Car. II. c. 8, s. 7, and may therefore be the subject of an information (*b*).

In the *Attorney General* v. *Marquis of Stafford*, already stated (*c*), the lord of the manor had power, upon complaint, to give the minister half a year's warning, and if he had not reformed by that time, to remove him. On an information praying that the lord might be decreed to allow and approve the candidate who had the majority of votes, which was refused on the ground of misconduct, proved by evidence; a new election was directed, upon which the same candidate was returned, and upon his producing strong affidavits of good conduct for the last six years, a decree was made, declaring that the relator deserved the approbation of the trustees (*d*).

SECTION III.

Of the Appointment and Removal of Schoolmasters.

THE majority of a number of persons who are intrusted with powers, not of mere private confidence, but in some respects of a general nature, and who are all regularly assembled, may bind the minority, for the act of such majority will be considered the act of the whole. The cases of corporations go further: there it is not necessary that the whole number should meet; it is enough if notice is given; and a majority,

(*a*) *Attorney General* v. *Brereton*, 2 Ves. sen. 429; 1 Sid. 426; Co. Litt 120.

(*b*) *Attorney General* v. *Brereton*, 2 Ves. sen. 424; *ante*, p. 73; *Attorney General* v. *Newcombe*, 14 Ves. 1; *Attorney General* v. *Parker*, 1 Ves. sen. 44.

(*c*) *Ante*, p. 382.

(*d*) *Attorney General* v. *Marquis of Stafford*, 3 Ves. 77; *S. C.* 3 T. R. 646.

or a less number, according to the charter, may meet, and when they have met, they become just as competent to decide as if the whole had assembled (*e*).

It is a general rule of law, that where a *public trust* is to be performed by a definite number of persons, it must be executed at a meeting where a majority of that number is present, unless there be a usage or custom to the contrary. It is different from a trust or power of a private nature, for that must be executed by all the persons to whom it is given (*f*).

Under stat. 9 Geo. I. c. 7, s. 4 (*g*), which enables the churchwardens and overseers, with the consent of the major part of the parishioners, to contract for the providing for the poor, it was held not to be necessary that *all* the churchwardens and overseers should concur, but that a contract by the majority would bind the rest. Lord *Kenyon* observing that the case was very different from that of trustees of settlements, who are generally chosen by the different branches of the family, in which case it is necessary that they should all concur in every act, in order that each may protect the interest which he was appointed to guard (*h*).

A power to appoint a schoolmaster to an ancient foundation given by deed to the vicar and churchwardens (of whom there were eleven), and in case of their neglect in appointing, then

(*e*) *Grindley* v. *Barker*, 1 Bos. & Pull. 236; 6 B. & C. 332; 9 B. & C. 651; 2 Cr. & Jerv. 655. See *Oldknow* v. *Wainwright*, 2 Burr. 1017; *S. C.* 1 W. Bl. 229. By stat. 5 & 6 Will. IV. c. 76, s. 90, the council of boroughs, at which two-thirds at least of the members shall be present, may make bye-laws for the government of the borough, and for the prevention and suppression of nuisances, and may appoint fines not exceeding 5*l.* for the infraction of such bye-laws; by the 69th section, in all other cases, if the meeting consist of one-third of the members of the whole council, it will be sufficient. All questions are to be decided by a majority of the members present; and if the votes be equal, the mayor, or other person presiding, shall have a casting vote.

(*f*) Co. Litt. 49 a; *Blacket* v. *Blizard*, 9 B. & Cr. 857. See *Curtis* v. *the Kent Waterworks*, 7 B. & C. 314; *Rex* v. *Whitaker*, 9 B. & C. 648.

(*g*) *Ante*, p. 29.

(*h*) *Rex* v. *Beeston*, 3 T. R. 592. See *Cook* v. *Loveland*, 2 Bos. & Pull. 31.

to devolve to two corporate bodies in succession, and to result in the dernier resort, to the same vicar and churchwardens, to whom also the general power of managing the trust was committed, was held to be well executed *by the vicar* and a majority of the churchwardens, especially where such mode of election was supported by usage (*i*).

The principle of these cases is not confined to trustees who are appointed under some public authority, as under an act of parliament or some public body. A charity was established in the reign of Henry VI., and certain property conveyed to trustees in fee for the relief of the poor, the repair of the church and highways, and of a particular bridge, and the payment of fifteenths. The trustees erected a school-house, and applied part of the funds of the charity in the instruction of the poor children of the parish, in which it has been already shown they were justified (*j*). All the surviving trustees, in number seven, to whom the property had been conveyed upon the charitable uses mentioned in the original gift, met, and five of them concurred in appointing a schoolmaster, but two of them dissented, although no act was done in consequence of such dissent.

Lord *Lyndhurst*, C. B., said, it was unnecessary to say whether or not that was to be considered as a concurrent election by the seven, because in a case of this description, when all the trustees were assembled for the purpose of making the election, and the majority of them so assembled concurred in the appointment of a schoolmaster, the act of the majority in that respect is to be considered as the act of the whole body, upon the ground that the trust was of a public nature, and that when trustees are appointed for the purpose of performing a trust of a public and general nature, like that in question, the act of the majority is to be considered as the act of the whole body (*k*).

This rule is founded on the principle, partly of preventing

(*i*) *Withnell* v. *Gartham*, 6 T. R. 388; *ante*, p. 565.

(*j*) *Ante*, p. 629.

(*k*) *Wilkinson* v. *Malin*, 2 Crompt. & Jerv. 636, 655; *S.C.* 2 Tyrw. 544.

the inconvenience which would result from the obstinacy of one or more of a large body of trustees refusing to concur in an election (*k*), and partly on an intention of the founder, inferred from the nature of such trusts, that the act of the majority of the trustees should bind the rest (*l*).

A vicar, churchwardens, and overseers of the poor of a parish, had the nomination of the master of a charity-school and a vacancy having occurred, a meeting was held to elect a successor to the office, at which the vicar, the two churchwardens, and the four overseers of the poor attended. After a candidate had been elected at such meeting, and a minute of his election had been entered by the clerk, it was held to be competent for the majority of the electors, before the meeting was dissolved, to reverse their vote, rescind the minute of election, and postpone the election to a subsequent day, provided, in so doing, they acted *bonâ fide*, and with a view to the welfare of the charity (*m*).

By statute 13 and 14 Car. II. c. 4, every schoolmaster keeping any public or private school, and every tutor in any private family, must subscribe the declaration that he will conform to the liturgy of the church of England, as by law established, and be licensed by the ordinary. The bishop may examine the party applying for a license, as to his learning, morality, and religion (*n*), and take time to inquire into the character of an elected schoolmaster, before granting the license (*o*).

The provisions of the legislature, with respect to dissenting and Roman Catholic schoolmasters, have been already mentioned (*p*).

(*k*) *Withnell* v. *Gartham*, 6 T. R. 388; *Rex* v. *Beeston*, 3 T. R. 592.

(*l*) 2 Cr. & Jerv. 656.

(*m*) *Attorney General* v. *Matthew*, 3 Russ. 500.

(*n*) *Rex* v. *Archbishop of York*, 6 T. R. 490; *ante*, p. 397. An indictment does not lie for keeping a writing or reading-school, not being a grammar-school, without such license. *Rex* v. *Dowse*, 1 Lord Raym. 672.

(*o*) 2 Str. 1023. Com. 448. See stat. 23 Eliz. c. 1, ss. 6, 17. 1 Jac. I. c. 4, s. 9; *Cox's* case, 1 P. Wms. 29; *Matthews* v. *Burdett*, 2 Salk. 672.

(*p*) *Ante*, pp. 102, 109, 111. By 53 Geo. III. c. 107, commissioners

We have already seen that a master of a free school of royal foundation, may be elected on an information in the attorney general's name (*q*).

By the orders made on the foundation of a school, it was provided that the schoolmaster should from time to time be appointed by three of the original feoffees named, or their respective heirs male for the time being, or three of them; and if there should not be an heir male of any of such three feoffees, then from time to time, upon every death or removal, the schoolmaster should be chosen by the curate, churchwardens, and six other of the chief inhabitants of *Woodbridge* for the time being. The three feoffees being all dead without an heir male to any of them, disputes arose as to naming six of the chief inhabitants, to join with the curate and churchwardens in the appointment of a schoolmaster, and upon the last vacancy two persons had been elected.

On a petition being presented to the lord chancellor, as visitor, praying a declaration in respect of the late election of a master of the school, and directions for the future elections, Lord *Eldon* said, "the master has hitherto had a freehold in his office, and he doubted very much whether the visitor could appoint him. It was clear, the curate and churchwardens, officiating in some manner with six of the chief inhabitants, were the patrons of the office. It was in their gift, not in the gift of the visitor; and the mere circumstance, that they had made two elections that were both void, would not authorise the visitor himself to appoint the master, but only authorise him to call upon the persons entitled to make the appointment" (*r*).

are appointed for the regulation of endowed schools in Ireland.

(*q*) *Attorney General* v. *Town of Shrewsbury*, Bunb. 215; *ante*, pp. 336, 337.

(*r*) It was referred to the attorney general to consider and report, what directions or alterations touching the mode and right of election and appointment of a schoolmaster, upon the present or any future vacancy, would be fit and proper to be made; and what directions and alterations were proper to be made in the orders, constitutions, and directions of the said school, as should seem to him most conducive to the interest and benefit of the objects of

Where by the statutes of a charity school a master was to be nominated by the wardens within sixty days after an avoidance, upon their default by the dean and chapter of *York* within thirty days, and then by the bishop, it was held that such right of nomination was not subject to the general rules of lapse as in cases of presentation to livings (*s*).

Schoolmasters of endowed schools have frequently an estate of freehold in their office, to which a right to the school-house and other property is attached; but they are often liable to be removed by the visitor for misconduct, such as neglecting the scholars (*t*).

In a recent case, it was held that a schoolmaster may have a sort of middle interest, neither amounting to an estate for life, subject to defeasance, nor yet an estate at will; but accruing to him out of a nomination by the trustees, as part of a contract between them, and conferring a right to the employment of a schoolmaster, and the occupation of the school-house, during good behaviour, and until a dismissal by the trustees, in whom the legal estate is vested, or a majority of them, on reasonable notice (*u*). Such an appointment not conferring an office incident or appurtenant to land, may be made without deed, and even without writing (*v*). But

the charity, and the furtherance of the intention of the donors thereof. *Attorney General* v. *Black*, 11 Ves. 191.

(*s*) *Attorney General* v. *Wycliffe*, 1 Ves. sen. 80.

(*t*) *Doe* d. *Thanet* v. *Gartham*, 8 Moore, 368; *ante*, pp. 365, 366; *Doe* d. *Coyle* v. *Cole*, 6 Carr. & Payne, 359.

(*u*) A schoolmaster, appointed by a majority of trustees, in whom the fee was vested, was held to have an interest of that description, under terms in substance as follows: that there should be paid to the master a salary of 40*l.* annually, so long as he should continue such schoolmaster of the said school-house; and that he should be permitted to have the possession and enjoyment of the dwelling-house and premises, as his residence as such schoolmaster, until his dismissal from the said employment by a majority of the persons, who, for the time being, should be seised of the same premises. *Wilkinson* v. *Malin*, 2 Cr. & Jerv. 636, 650, 658; *S. C.* 2 Tyrw. 544; *ante*, p. 727.

(*v*) *S. C.* Ibid. If a schoolmaster is in effect the *cestui que trust* residing upon what is substantially his own, under a trust for his benefit,

where land belongs to an office, it seems that the appointment to the office must be by deed in order to pass the freehold in such land (*w*).

It was held that notice to a schoolmaster to retire from his office within a certain time, given by five out of ten trustees of a charity, without any public meeting, or any declaration by a majority assembled at such a meeting, was not a valid dismissal; because, in the first place, at the time when the notice was given, there were ten trustees, so that the persons who gave notice did not even constitute a majority of the whole body. In the next, even if they did constitute a majority of the whole body, it was the whole body which was to dismiss, and not a majority of it. So that, if there was a meeting, and a majority were for dismissal, then the declaration of the majority is not merely that of the majority, but of the whole body, which does in fact dismiss (*x*).

In the year 1621, certain lands were granted to fourteen feoffees, for the maintenance of a schoolmaster, to instruct the children of all the inhabitants of a parish; and it was provided that no act concerning the lands should be done, but in a vestry or meeting of the feoffees, and ten at least of the inhabitants of such parish, which should be vestrymen and not feoffees, at a vestry meeting; and a power of removal of the schoolmaster was given, so that it was with the consent and agreement of the feoffees and vestrymen, or the major part of them, which should be assembled in vestry, so always as at least ten of the vestrymen, which were not feoffees, should vote at the holding of the vestry. The judges of

he acquires a settlement, *Rex* v. *Owersby Le Moore*, 16 East, 356. See *Rex* v. *Melborne*, Burr, *S. C.* 244. So a schoolmaster gains a settlement under 13 & 14 Car. II. c. 12, by residing in a house worth 10*l.* a-year assigned to him, rent free, in his character of schoolmaster, although he was liable to be dismissed from his office at the will of the donor. *Rex* v. *Lakenheath*, 2 Dowl. & R. 816, *S. C.* 1 B. & C. 531. See stat. 4 & 5 Will. IV. c. 68.

(*w*) Co. Litt. 49 a; *Saunders* v. *Owen*, 1 Salk. 467; *S. C.* 1 Ld. Raym. 158.

(*x*) *Wilkinson* v. *Malin*, 2 Crompt. & Jerv. 656, 657; *S. C.* 2 Tyrw. 544.

the Court of Common Pleas, on a case referred to them by the vice chancellor, certified, that in the execution of the power of removal of the master, the votes were to be taken *per capita*, and not according to the provisions of the act 58 Geo. III. c. 59, for the regulation of parish vestries (*y*).

A corporation intrusted, in their corporate capacity, with the management of certain property, clothed with a trust for the maintenance of a schoolmaster, with the power of nominating him and dismissing him at their will and pleasure, would not, any more than an individual with such a power over an estate devoted to a charity, be permitted to act corruptly in the execution of the trust, as in removing the schoolmaster because he had not voted at an election of members of parliament for a borough according to the wishes of certain members of the corporation (*z*).

It seems that at common law, a general resignation bond of an office is legal, although the party may have a freehold in the office; and that a bond given by a schoolmaster of an ancient public school, who had a freehold in his office, to resign at the request of the patron of the school making the appointment, is good at law, although equity will restrain any improper use of it by the patron. Lord *Kenyon* saw nothing illegal or wrong in the patron of the school taking such a bond, for it enforces the good behaviour of the master, and may tend to prevent those ill consequences which too frequently happen from the neglect of those whose duty it is to superintend such institutions. It being a more easy method of exercising a visitatorial authority, which must exist somewhere (*a*).

(*y*) *Attorney General* v. *Wilkinson*, 7 Moore, 187; *S. C.* 3 Brod. & Bing. 266.

(*z*) *Dummer* v. *the Corporation of Chippenham*, 14 Ves. 252.

(*a*) *Legh* v. *Lewis*, 1 East, 391; cited 1 Bligh, N. S. 158. There was a writ of error in this case, but the point in question was not decided, because it did not appear upon the record that the schoolmaster had a freehold office; *S. C.* 3 Bos. & Pull. 231. See *Laying* v. *Paine*, Willes, 571, on the stat. 5 & 6 Edw. VI. to prevent the sale of public offices; *Bagshaw* v. *Bossley*, 4 T. R. 78, that a bond in aid of the law is valid. Lord

It is not the practice of the Court of Chancery to remove the master of a school where there has been any misunderstanding as to his duty; but when that duty is prescribed, the master must determine either to hold the situation, doing the duty, or to discharge himself (*b*). Neither is it the practice to remove a master who has been appointed by trustees *de facto* acting as such, whether the estates were rightly vested in them or not; but the ground of removing a master who has acted under an undue appointment, must be such misconduct as would be sufficient to discharge him under an appointment originally right (*c*).

A schoolmaster, whose election was declared to be void, was allowed the rents during the time he performed the duties, and until the appointment of another (*d*).

The question whether the offices of vicar and schoolmaster of a parish are incompatible will be determined by the court, and not made a subject of inquiry before the master. An information, insisting that such two offices ought not to be held by the same person, was dismissed where there was neither any manifest intention, on the part of the founder, that the two offices should not be held together, nor evidence that the performance of the duties of a vicar had occasioned a neglect of those of schoolmaster. A schoolmaster has his duties prescribed to him by the rules and regulations, and by the practice of the school. If, being vicar of the parish, he cannot observe those rules and regulations, and act according to that practice, that would be a ground for his removal from the school. But the duties of the two offices are not necessarily incompatible. If a master neglects his duty as vicar, but performs his duty as schoolmaster, the

Brougham held, that the amount of the master's salary ought to be the subject of a general regulation by the governors of a free school, and not of a special agreement; *ante*, pp. 586, 587.

(*b*) *Attorney General* v. *Coopers' Company*, 19 Ves. 192.

(*c*) *Attorney General* v. *Hartley*, 2 Jac. & Walk. 375; *Attorney General* v. *Dixie*, 13 Ves. 535, 541; see *Foley* v. *Wontner*, 2 Jac. & Walk. 247.

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court has nothing to do with such neglect as vicar. But if it be shown, that a master has given so much personal attention to his vicarage as to neglect his school, the court will dismiss him on the ground of his neglect of duty as schoolmaster, if that be established by evidence. If, on the other hand, it appears, that, according to the intention of the founders of a school, the vicar of the parish could not hold the office of schoolmaster, the court has not to consider whether the two offices are incompatible, but its dry, simple, naked duty would be, to remove him, on the ground of such intention, which must be clearly manifested (*e*).

The master will not be allowed to hold such two offices where it is inconsistent with the foundation of the charity. For example, where the management of the property belonging to a grammar-school, founded by letters-patent, was, by the statutes of the founder, vested in a corporate body, consisting of the *vicar*, the master of the school, and the three churchwardens of the parish; and the schoolmaster was by such statutes made responsible to the *vicar* and churchwardens for his good conduct. The schoolmaster in possession having been subsequently collated to the vicarage of the parish, an information was filed, alleging that, under such circumstances, the union of the two offices of vicar and schoolmaster in one person was very detrimental to the interests of the school, and contrary to the intentions of the founder, and had caused the undue application of the funds arising from the charity belonging to the poor of the parish, inasmuch as the churchwardens had never attended to the examination of the accounts, nor in any manner interfered with nor controlled the master in the management thereof, and therefore there was no control over the master, and submitting that under the circumstances, the defendant ought not to be permitted to hold such two situations, and that if he refused to resign the vicarage of the parish, that then he ought to be removed from the office of schoolmaster.

A decree was made, ordering the master to elect either to

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give up the mastership of the grammar-school, or to resign the vicarage; but such election was not to be made until after the master in chancery had made his report, whether or not the schoolmaster was exclusively entitled to the rents of any part of the estates (*e*).

It appears by a case already stated, that the visitors and masters of an endowed school cannot maintain an ejectment against the schoolmaster unless his interest has been determined on a previous summons (*f*). It seems that neglecting the scholars would be good ground of amotion (*g*). If the master of a free school has an estate of freehold in his office, he cannot be removed at the pleasure of the patrons of the school; but the Court of Chancery will, upon petition, restrain an ejectment brought by the patrons to evict the master from the possession of the school-house (*h*).

In an ejectment against a schoolmaster who has been removed by the sentence of trustees of the school for misbehaviour, it is not necessary for them to prove the grounds of the sentence, nor can the defendant disprove them. But the defendant may give in evidence the declarations of a former trustee who signed the sentence, and who is since dead, for the purpose of showing that his signature was corruptly obtained (*i*).

SECTION IV.

Of the Appointment and Removal of Trustees generally.

THE provisions contained in various acts of parliament respecting the appointment of trustees have already been stated (*k*). Some cases, however which have occurred

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(*f*) *Ante*, pp. 365—367.

(*g*) *Doe* d. *Coyle* v. *Cole*, 6 Carr. & Payne, 359.

(*h*) *In re the Free Grammar-School of Chipping Sodbury*, 8 Law Journ. Chanc. 13.

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respecting provisions for the appointment of trustees of charities, remain to be considered.

Proper powers for the appointment of new trustees should always be inserted in instruments establishing charities which are not incorporated, in order to supersede the necessity of an application to the Court of Chancery for that purpose. The direction for the appointment of new trustees is sometimes given to the surviving trustees, in the event of the death, refusal, or incapacity to act, or residence out of Great Britain, of any one or more of those appointed. In other cases, the new appointment is not directed to be made until the trustees are reduced by any of those events to a given number (*l*). In some instances, the right of choosing new trustees has not been confided to the discretion of the old trustees, but the founders of charities have required the trustees to be appointed to have particular qualifications, as residence in a parish or district, or the holding particular offices, and given the right of nomination to particular persons, or directed the appointment to be made with the consent of the lord of the manor, or the rector or vicar of the parish, or others.

By a private act, 6 Geo. IV. c. 56, relating to *Waddington Hospital*, the power of appointing new trustees was enlarged, because a literal compliance with the directions of the founder for the election of new trustees, had become impracticable.

A provision for the appointment of new trustees is sometimes inserted in schemes settled by the master (*m*).

In the *Attorney General* v. *Floyer* (*n*), a question arose on a devise to six trustees and their heirs, of the right of nominating a minister of a donative, and also of a rent charge, &c., for the support of a minister, with a direction, that when the trustees were reduced to the number of *three*, they should choose others. All the trustees but one having died, the

(*l*) See *ante*, pp. 33, 313, 507.

(*m*) *Attorney General* v. *Morland*, Reg. lib. A. 1833, fol. 277.

(*n*) 2 Vern. 748. See *Foley* v. *Wontner*, 2 Jac. & Walk. 245; *post*, sect. v. 3.

surviving trustee filled up the number, and conveyed to new trustees. It was insisted that the trustees having neglected to convey to new trustees when the number was reduced to *three*, that the single trustee had not power to elect others, and that the court ought to appoint trustees. But it was held to be only directory to the trustees, that when reduced to *three*, they should fill up the number of trustees; and although they had neglected to do so, that the right was not extinguished, and that the surviving trustee had a better right than any one else, and had power to convey to the new trustees.

In another case, a question of an opposite description arose, upon a deed declaring the trusts of a dissenters' meeting-house, which had been conveyed to twenty-five persons, by which it was provided, that when, by death or otherwise the number of the said trustees should be reduced to fifteen, then the said remaining fifteen trustees, or the majority of them, or the survivors or survivor of them, should proceed to elect, &c. "so as to make up the complement of twenty-five, and to convey to the whole body so completed."

The number of trustees having been reduced to seventeen by deaths, eight new trustees were elected by the majority of the surviving trustees. *Eyre*, C. B., was of opinion, that, upon the whole scope of the instrument, the trustees had not exceeded their powers in electing new members into their body; for the general intention of the deed was, that there should be a succession of trustees on the death of those originally created; and the period of their being reduced to fifteen, was that at which they were *compellable* to fill up their numbers, although they might do it sooner (*p*).

The founder of a school directed, that so often as the trustees should be reduced to two, such survivors should nominate a certain number of persons, *being inhabitants* of a particular parish. An information to remove them because they were not such inhabitants was dismissed by Lord *Thurlow*, no evidence having been given that there

(*p*) *Doe* d. *Dupleix* v. *Roe*, 1 Anstr. 86.

were proper persons in the parish in question to be trustees (*q*).

Where a deed provided that the heirs of the founder should nominate the trustees of the charity, it was said by Lord *Redesdale*, that the court had no power to supersede that direction, and to make an order on a petition under 52 Geo. III. c. 101, in the absence of such heir, for the appointment of new trustees; and even in the case of an information, an inquiry must be made who is the heir of the founder, unless it be established by evidence that none was in existence (*r*).

By an act for the relief of the poor of a parish, the vicar, churchwardens, and overseers for the time being, and certain persons named, were to be trustees for carrying the act into execution; and a meeting was held every third year to elect new trustees in the room of those who should have died, removed, become disqualified, or relinquished the office; so that the number should every third year be "filled up to the number of fifty-one over and besides the vicar, churchwardens and overseers of the poor for the time being." One of the fifty-one trustees having become churchwarden, it was held that a person, by becoming an official trustee, did not forfeit the character of trustee which he held by a previous appointment (*s*).

Municipal corporations have, in many cases, been constituted trustees (*t*) of charities, and they may, by the decree of

(*q*) *Attorney General* v. *Cowper*, 1 Br. C. C. 439. The case of *Attorney General* v. *France*, upon a similar decree, was cited, where it was said that trustees had been removed merely on the ground of not being inhabitants; but Lord *Thurlow* thought the case must have been decided upon some other special ground not there appearing. See *ex parte Bolton School*, 2 Br. C. . 62; *ante*, p. 341.

(*r*) *Corporation of Ludlow* v. *Greenhouse*, 1 Bligh, N. S. 80, 81. See *Attorney General* v. *Gaunt*, 3 Swanst. 148, n.; *ante*, pp. 432, 506.

(*s*) *Rex* v. *the Trustees St. Mary Abbotts, Kensington*, 2 B. & Adol. 740. See *Rex* v. *the Justices of Kent*, 4 Nev. & M. 299.

(*t*) See Report on Municipal Corporations and Appendix thereto; *ante*, p. 314, n. (*k*).

the court, be divested of their trust in the same manner as any other trustees (*u*).

A misapplication of the increased revenues, gross misbehaviour in the execution of the trusts, and an inability to pay the sums due to the charity, were held sufficient grounds for transferring an estate, vested in a corporation as trustees for a charity, to other persons more able and willing to discharge the trust faithfully (*v*).

Trustees, in whom the right of nominating a preacher of a parish is vested, commit a breach of trust by assigning it. Thus, A. being impropriator of a parish, demised part of the tithes to certain parishioners as trustees for 1000 years, who redemised the same to him for 999 years, under a yearly rent of 50*l.*, payable to the trustees, as a provision for a preacher to be nominated by the trustees. The heir of A. afterwards sold the rectory to B., and the representative of the surviving trustee was prevailed upon to assign to B. the right of nominating the preacher. From the date of the original demise, and for forty years and upwards after the latter transaction, the preacher was constantly nominated by the parishioners; but, upon a contest between them and B., it was held that the right of nomination was absolutely in the trustees, and that the assignment of that right was a breach of trust; and directions were given by the House of Lords, for the establishment of the trust in the trustees, to be impartially chosen, and for keeping up the number of trustees in future (*w*).

A trustee dissenting to a breach of trust committed by his co-trustees, may, by applying to a court of equity, take the matter out of the hands of those trustees who are misapplying the funds of the charity (*x*).

It is a clear breach of trust for the maintenance of a chapel, of whatever description it may be, to pull it down, and

(*u*) *Ex parte Kirkby Ravensworth Hospital*, 13 Ves. 314; *Attorney General* v. *the Earl of Clarendon*, 17 Ves. 499; *Mayor of Colchester* v. *Lowten*, 1 Ves. & B. 246.

(*v*) *Mayor of Coventry* v. *Attorney General*, 7 Br. P. C. 235, 2nd ed.

(*w*) *Foley* v. *Attorney General*, 7 Br. P. C. 249, 2nd ed.

(*x*) *In re Chertsey Market*, 6 Pr. 279.

sell the materials, and to let the land upon which it stands for building houses (*y*). The trustees, however, may deviate from the original terms of the trust, if its substantial object be preserved. Thus, trustees in whom lands were vested in trust to lay out the rents for the use of a parish church and a chapel of ease, and in repairing the same, were held to be justified in having, by the direction of the inhabitants assembled in vestry, pulled down the old chapel and bought a piece of ground for building a new one out of the charity funds in their hands, although the court declared that the future rents were not liable to make good any debt contracted for rebuilding, and enjoined the trustees from raising the money by mortgage (*z*).

So, the trustees of a charity founded by charter for building a market-house were held to be justified in pulling it down, when it had become a nuisance to the town, and in building another instead on a different site. For although the trustees might perhaps have been originally bound to build the market-house on the particular spot pointed out and granted by the charter, yet they were not restrained from removing it to any other place which they might think more fit for it, in the sound exercise of their judgment and discretion in after times, the charter containing no definition of the spot on which the new building was to be erected, nor of its size or dimensions. It was considered by the court sufficient evidence of a due discretion having been exercised, that the principal inhabitants of the place concurred in the subscriptions raised amongst people in the neighbourhood for erecting the new building on private property (*a*).

There seems to be no case in which the Court of Chancery has awarded damages for a breach of trust. Lord Keeper *Coventry* was of opinion that he could not; and declared, in the case of a chapel vested in a trustee, that where there was a gross breach of trust, all he could do

(*y*) *Ex parte Greenhouse*, 1 Madd. 92; *Corporation of Ludlow* v. *Greenhouse*, 1 Bligh, N. S. 17; *ante*, pp. 488—490.

(*z*) *Attorney General* v. *Foyster*, 1 Anstr. 116.

(*a*) *In re Chertsey Market*, 6 Price, 261.

was, to make the persons who had committed it account for all the profits they had made, though the thing had received considerable damage (*b*).

The principles on which the court proceeds in directing accounts against corporations, have been already considered (*c*).

The mode of calculating the amount of the fines to be paid by trustees on their admission to copyholds subject to arbitrary fines, is settled by the following case:—by a decree made on an information in 1729, to which the parties interested in the charity and the lord of the manor were parties, it was ordered that the charity, contained in a certain copy of court roll and deed of trust, should be established, and the lands held according to the grant, at a certain annual rent of 5*s.* and a reasonable fine upon every surrender and admittance, according to the custom of the manor; and the trustees being all dead, it was referred to the master to nominate thirteen other copyhold tenants of the manor of *Hampstead*, and inhabitants of the parish, to make up the original number of fourteen trustees; that the defendants, the surviving trustees, should surrender to such new trustees; and that the lord of the manor for the time being should admit them paying a reasonable fine: and when at any time thereafter the number of the said trustees should be reduced to five then the lord of the manor for the time being, should, with the approbation of the master, nominate nine others qualified as aforesaid, to be added to the five, and a new surrender should be made to their use on the same trusts, and that the lord of the manor should admit them paying a reasonable fine. The number of trustees having, in 1826, been reduced to five, nine were selected by the lord in the manner mentioned in the decree, and such fourteen trustees were duly admitted trustees of the charity estates. By the custom of the manor, two years' improved value was the fine payable for a single life.

(*b*) *Per* Lord *Redesdale* in *Corporation of Ludlow* v. *Greenhouse and others*, 1 Bligh, N. S. 57, 58, 355.

(*c*) *Ante*, pp. 455, 456—465.

It was held by Lord *Tenterden*, C. J., that the proper mode of estimating the fine, is to take for the second life, half the sum taken for the first; for the third, half the sum taken for the second; and for the fourth, half that which is taken for the third; and so on. The effect of that mode of calculation is, that the fine does not amount to quite double the sum taken upon the first life, and it was held, that a fine exceeding that amount, and assessed upon the principle of two years' value for the first life; half of that for the second life; a third for the third life; a fourth for the fourth; and so on to the ninth life, was unreasonable (*d*).

SECTION V.

Of the Appointment and Removal of Ministers and Trustees of Dissenters' Establishments.

1. *Deviation from the intention of the Founder will not be allowed.*
2. *Of the Election and Removal of Dissenting Ministers*, p. 761.
3. *Of the Appointment of Trustees*, p. 765.

1. *Deviation from the intention of the founder will not be allowed.*] Trustees of a charity established by dissenters, will not be permitted to divert it from its original and proper object, by devoting it to another which could not have been within the intent of the founder.

Disputes and difficulties have frequently arisen in the administration of trusts relating to the places of worship belonging to dissenters, where the doctrines originally agreed to be inculcated, have not been adhered to by all the congregation; but it is now settled that chapels must continue

(*d*) *Wilson* v. *Hoare*, 2 B. & *Abney*, 1 Burr. 217; see 1 Scriven on Cop. 389—395, 3rd ed Adol. 350; *Taylor* v. *Pembroke*, cited Id. 354; *Earl of Bath* v

to be used for the promulgation of such doctrines as were originally agreed on (*e*). If the parties cannot agree as to the trusts on which a meeting-house is held, it will be referred to the master to inquire what the trusts are, and in the mean time, all parties will be enjoined from disturbing the existing state of things.

Where a congregation become dissentient among themselves, the original institution must alone be looked to as the guide for the decision of the court; for the reference to any other criterion, as to the sense of the existing majority, would be to make a new institution altogether beyond the reach, and inconsistent with the duties and character of the Court of Chancery.

In *Craigdallie* v. *Aikman* (*f*), the question was, whether the use of a chapel purchased at the time of the secession from the church of *Scotland* in 1737, by and for a body of men adopting the secession principles, and for that reason, adhering or submitting to the secession judicatory, was merely on account of that act of adherence or submission, without any special contract on the subject, for ever after to be regulated and directed by the judicatory in question, notwithstanding a departure by that judicatory from the principles which led to the original adherence, and in opposition to the wishes of a great proportion of the purchasers, who still held their original principles.

Lord *Eldon* held, if property be given in trust for certain persons, forming a congregation for religious worship, and the instrument provide for the case of schism, the court would act upon it; but if there be no such provision in the instrument, and the congregation happen to divide, the trust will not be executed at the expense of a forfeiture of the property by the *cestuis que trusts*, for adhering to the opinions and principles in which the congregation had been originally united. The court will enforce such a trust for those who adhered to the original principles of the society,

(*e*) *Foley* v. *Wontner*, 2 Jac. & Walk. 247; *Craigdallie* v. *Aikman*, 1 Dow, P. C. 1; *Attorney General* v. *Pearson*, 3 Mer. 352.

(*f*) 1 Dow, 16.

without reference to the majority, and *à fortiori* where those who have changed their opinions, instead of being a majority, do not form one in ten of those who had originally contributed.

If land or money be given in a way not prohibited by the stat. 9 Geo. II. c. 36, for the purpose of building a church, or otherwise for the maintaining and propagating the worship of God, and there be nothing more precise in the case, the Court of Chancery will execute such a trust, by making it a provision for maintaining and propagating the established religion of the country. So an express trust for maintaining a society of Protestant dissenters, promoting no doctrine contrary to law, although at variance with the established religion, will be administered according to the intent of the founders (*g*). If it cannot be discovered from the deed of trust what form or species of religious worship was intended, there must be an inquiry into what has been the usage of the congregation (*h*). The mode of proceeding in the Court of Chancery, for administering trusts relating to dissenters' charities, has already been considered (*i*).

In the *Attorney General* v. *Pearson* (*k*), it appeared that a body of Protestant dissenters had, in the year 1701, established a meeting-house "for the worship and service of God," in general terms. The deed directed that there should be twelve or more trustees, and that they or the major part of them, should, from time to time, upon any meeting to be appointed upon matters in any respect relating to the said meeting-house, make such orders therein as they should think convenient; such orders to be binding on all parties concerned. It was also provided, that if at any time meetings for the service of God should be prohibited by law, that then the property should be sold by the trustees, and converted to other charitable purposes. In 1720, other land was conveyed for the support of the minister of the said meeting-house, in which was contained a trust for the appli-

(*g*) *Attorney General* v. *Pearson*, 3 Mer. 409; *ante*, p. 104.

(*h*) *S. C.* Ibid, 400; *ante*, pp. 562—567.

(*i*) *Ante*, pp. 415—420.

(*k*) 3 Mer. 353.

cation of the property in the event of the repeal of the toleration act, 1 W. & M. c. 18.

An information and bill were filed to quiet the possession of the relators and plaintiffs (one of whom claimed as the surviving trustee, the other as minister of the chapel) for the appointment of new trustees, and an injunction to stay proceedings in ejectment by the defendants, claiming also to be trustees of the meeting-house. The plaintiffs contended that the intention of the deed was for promoting the doctrine of the Holy Trinity, and that the trust could not be diverted from the purpose for which it was intended; the defendants insisted that the intention was as general as the purpose expressed, and had no regard to any particular tenets.

Lord *Eldon*, in reference to the question what, in respect of doctrine, was the intent of the founder, said, without entering into what might be the effect of the stat. 53 Geo. III. c. 160 (*l*), or considering whether it is now legal to impugn the doctrine of the Trinity, the inquiry was, whether the deed creating the trust did, or did not, upon the face of it (regard being had to that which the toleration act (*m*), at the time of the execution of the deed, permitted or forbade with respect to doctrine) bear a decided manifestation, that the doctrines intended by that deed to be inculcated in the chapel were Trinitarian? Because, if that were originally the case, and if any number of the trustees are now seeking to fasten on this institution the promulgation of doctrines contrary to those which, it is thus manifest, were intended by the founders, they are seeking to do what was not in their power, and which neither they, nor all the other members of the congregation, can call upon a single remaining trustee to effectuate. In this view of the case also, supposing even that, at the time of the establishment of this institution, it had been legal to impugn the doctrine of the Trinity; yet, if the institution had been established for Trinitarian purposes, it could not now be converted to uses which are Anti-trinitarian. For to allow such a conversion would be to allow a trust for the benefit

(*l*) *Ante*, pp. 103, 108. (*m*) *Ante*, pp. 101, 102.

of A. to be diverted to the benefit of B. And the question then resolves itself into this, whether such a conversion, in the case of a trust, can possibly be supported. If, therefore, this appears, on the face of the deed, to be the nature of the case, it disposes of the question; affording a short and direct reason for not refusing the interference of the court (*n*).

His lordship observed, "It is impossible to doubt that the trust was originally created for the purpose of maintaining a protestant dissenting institution; and it would be doing violence to the intention of the parties to the deeds in question, to say, that the worship and service of God being the object expressed by them, the trust must be administered in such a way as to maintain the religion of the established church. Nevertheless, I take it from the experience of many years in the Court of Chancery, that if any body of persons mean to create a trust of land or money, in such a manner as to render the gift effectual, and to call upon the court to administer it according to the intent of the foundation, whether that trust has religion for its object or not, it is incumbent on them, in the instrument by which they endeavour to create that trust, to let the court know enough of the nature of the trust to enable the court to execute it; and, therefore, where a body of protestant dissenters have established a trust, without any precise definition of the object or mode of worship, I know no means the court has of ascertaining it, except by looking at what has passed, and thereby collecting what may, by fair inference, be presumed to have been the intention of the founders. From this deed I can collect, that the founders were protestant dissenters; and thence presume, that their object was the maintenance of protestant dissenting worship; but I have nothing to inform me what species of doctrine this institution was intended to maintain, except as I may be able to infer from some of the clauses of the deed, and particularly from that clause which alludes to the possibility of the future prohibition by law of the worship thereby intended to be established, and also from that which

(*n*) 3 Mer. 401, 402.

relates to the binding effect of orders to be made by a majority of the trustees, upon matters relating to the meeting-house *only;* from which it should appear, both that the founders meant to establish an institution which was not then contrary to law, and that they did not mean to invest in the trustees, or the major part of them, any right to vary the system or plan of doctrinal teaching which was to be maintained in the meeting-house according to their own discretion." Looking at the date of the deed, of 1701, and to the dates of the toleration act and of the act 9 & 10 Will. III. c. 32 (*o*), and also to the other deed, in 1720, which provided for the possibility of the future prohibition by law of the worship intended, Lord *Eldon* thought it impossible to say, that while the founders contemplated the eventual abrogation of the existing system of toleration, they were, in fact, intending to create, by that very deed, a system which was at that time illegal, and which, only three years before, was excepted out of the act of toleration (*p*).

That clause, therefore, seemed to afford extremely strong countenance to the allegation that the institution was not intended for the maintenance of those opinions which impugn the doctrine of the Trinity. His lordship also thought that it would be doing violence to the rules of construction, to hold that the clause giving the trustees powers to make orders as to the meeting-house, authorised them to convert it into a house of a different description, and for teaching different doctrines from those of the persons who founded it, and by whom it was attended. That appeared to Lord *Eldon* to be as inconsistent with the probable meaning of the original founders, as it would be to hold that they meant it should be converted, at the discretion of the trustees, into a place of worship according to the form and doctrines of the church of England (*q*).

(*o*) *Ante*, p. 102.

(*p*) Ibid.

(*q*) *Attorney General* v. *Pearson*, 3 Mer. 410—412. The court granted an injunction to restrain all further proceedings for recovering possession, and referred it to the master to inquire in whom the legal estate was vested, what was the nature and particular object (with

Proceedings in this case having been revived, Sir *L. Shadwell*, V. C. in giving judgment, said, "it certainly appeared to him, and he could not divest his mind of the notion, that though the period at which the trust of this chapel was made must be regarded, the thing to be considered, when a fund was given for the benefit of a certain class of persons, to promote the service and worship of Almighty God, was, what were the religious tenets and form of doctrine professed by such persons; for he could not bring himself to think that it was a just application of the trust fund of these individuals, if it were allowed in the main to be employed for the assistance of religious persons, and for the promotion of religious opinions, which they themselves altogether disavowed. He certainly did not think that the only thing to be regarded was the state of the law at the period the trust was created; but still it must be regarded in some degree, because the state of the law might assist in determining what were the opinions of the persons who created the trust; and if he found that at that time the preaching and promulgation of certain doctrinal opinions were not permitted by law, it might be reasonably inferred that the persons who created the trust for the worship and service of Almighty God, meant to create such a trust as would not include the promulgation of opinions which it was illegal to propagate at that period. That was the way in which it struck him. He had heard and read a great deal about the extreme anxiety which was manifested by the three principal denominations of dissenters—presbyterian, independent, and baptist,—to have their religion unfettered by what was termed creeds, but he could not help thinking that it was of much importance in their own minds, that certain religious opinions should be inculcated among their hearers, though they were sometimes at liberty to preach just what they pleased; and that the supporting and inculcating certain

respect to worship and doctrine); for the observance, teaching, and support of which the charitable funds or estates had been raised, distinguishing when and by whom they were created. *S. C.* Ibid. 420.

things assumed by them to be religious truths, might have been deemed of more importance than the mode by which they were disseminated. They meant, no doubt, there should be that sort of opinion taught which they themselves entertained, and the result had shown how very much that object had been attained with respect to the Presbyterians (*r*). A great change of opinion had undoubtedly taken place; they had swerved from the opinion of their forefathers, and had now become the advocates of widely different doctrines." His Honour was of opinion, looking at what were undeniably the opinions entertained by the Presbyterians at the period when the charity was founded, it might be safely inferred that the founders never could have meant that doctrines denying the Trinity should be taught in this chapel as part of the service and worship of God (*s*).

The principles laid down in the *Attorney General* v. *Pearson*, have been fully recognized and acted upon in the recent case of the *Attorney General* v. *Shore*, in which the

(*r*) See Neal's Hist. of Puritans, last ed.

(*s*) It was declared, that the meeting-house, and other property in the pleadings mentioned, ought not to be applied to the support or teaching of the doctrines of any sect of protestant dissenters who deny the doctrine of the Holy Trinity, or profess opinions as to the Christian religion, which at the time of the erection of the said meeting-house, could not be legally taught or preached therein; and the court declared that the two defendants ought to be removed from being trustees of the said meeting-house and other trust premises, and decreed the same accordingly; and it was referred to the master to approve and appoint proper persons to be trustees of the charity estates and property, and the relator and plaintiff was to be at liberty to propose himself as one of such trustees; and then it was ordered that the master should inquire and state to the court what are the lands, &c., belonging to the said charity, and in whose possession they had been, and into whose hands the rents thereof had come since the 1st February, 1817; the master to settle all proper deeds and conveyances for vesting the property in the trustees to be appointed, and that defendants execute the deeds as the said master should direct. *Attorney General* v. *Pearson*, 6th March, 1835, Reg. lib. A. 1834, fol. 370. An appeal against this decree was heard before the lord chancellor, in Hilary term, 1836, but judgment has not yet been given.

object of an information was to have it declared that the property settled by Lady *Hewley* ought not to be applied for the benefit of *Unitarians;* that, on the contrary, the benefits of the charity could only be enjoyed by the general body of dissenting Protestants who believe in the doctrine of the Trinity; that the trustees of the charity, being Unitarians, ought to be removed, and that an annual sum which had been granted to the officiating minister to the charity, who was a Unitarian, should for the future be disallowed (*t*).

(*t*) By indentures of lease and release dated 12th and 13th January, 1704, Lady *Hewley* conveyed certain estates to trustees in fee, "upon trust, as well to pay the rents yearly or otherwise, to such and so many poor and godly preachers for the time being of Christ's holy gospel, and to such poor and godly widows, for the time being, of poor and godly preachers of Christ's holy gospel, at such time or times, and for so long time or times, and according to such distributions as the trustees and managers for the time being, or any four or more of them, should think fit, and employ and dispose of such sums of money, and in such manner for the encouraging and promoting of the preaching of Christ's holy gospel in such poor places as the said trustees or managers for the time being should think fit, and also employ and dispose of such sums of money yearly, or otherwise, as and for exhibitions for such or so long time or times, for or towards the education of such young men designed for the ministry of Christ's holy gospel, never exceeding five such young men at one and the same time, as the said trustees and managers, for time being, or any four or more of them, should approve and think fit; and as to all the remainder of the residuary rents and profits of the premises, that the trustees and the survivors, &c. should employ and dispose of the same in and for the relieving of such *godly persons* in distress, being fit objects of the said Lady *Hewley's* and the trustees' and managers' charity, as the said trustees and managers for the time being, or any four or more of them, should think fit." In 1707, Lady *Hewley* conveyed a newly erected almshouse, in the city of *York*, and other property, to trustees, and directed the annual sum of 60*l.* to be raised out of the rents of the latter for the support of the people in the almshouse. The trustees were directed to place ten poor persons in the almshouse, whereof nine to be always poor widows, or unmarried women, so long as they should continue so, being of the age of fifty-five years or upwards, and the tenth person to be a pious and sober poor man, who might be fit to pray twice a-day, that is to say, once every morning and evening, with the rest of the inmates of the almshouse, and in de-

It did not appear that the trusts had been otherwise than duly performed for fifty years past in all essential particulars, unless it could be considered a departure from Lady *Hewley's* intention that part of the revenues should be applied in favour of dissenting ministers who entertained and preached Socinian or Unitarian doctrines of faith, or in the allowance of stipends to widows of such ministers, and exhibitions to students brought up in those sentiments. It was contended on the one hand, that as Lady *Hewley* attended a place of worship in which the doctrine of the Trinity was taught or acknowledged as a principle of the Christian religion, and referred in the trust deed to a catechism inculcating the same doctrine, and as the teaching of Unitarianism, which consists in a denial of the Trinity, was illegal, and had been made subject to penalties (*u*), shortly before the establishment of this charity, it could not be assumed that she intended to support or encourage preachers of the latter persuasion; but that, looking at the contemporaneous state of the law, she must be held to have intended to favour such ministers only as were within the then existing legal bounds of toleration. And on the other hand it was urged, that preachers of no particular denomination or religious opinion were designated by the trust deeds; and that it was impossible to ascertain what latitude of opinion

fault of this, the tenth person to be a poor woman qualified as the others. The trustees were directed to observe the rules and orders contained in a book signed by Lady *Hewley*. There were ulterior trusts as to the remainder of the rents of the estates comprised in this deed, similar to the trusts in the first deed. The rules, signed by Lady *Hewley*, to be observed for electing poor people into the almshouse, provided (amongst other things) that none but such as were poor and piously disposed, and of the Protestant religion, and of moral habits, should be admitted. "Let every almsbody be one that can repeat by heart the Lord's prayer, the creed, and ten commandments, and Mr. *Edward Bowles's* catechism. Let all the almspeople, when not disabled by weakness, duly repair to some religious assembly of the Protestant religion every Lord's-day, forenoon and afternoon, and at opportunities to attend the ordinances of God." See 19 Rep. Charity Commissioners, 807—815, 842.

(*u*) 9 & 10 Will. III. c. 32; *ante*, p. 102.

Lady *Hewley* would have allowed to the future objects of her bounty, upon points of faith and doctrine, and that since the stat. 53 Geo. III. c. 160, which removed the penalties for impugning the doctrine of the Trinity, all ministers are to be considered as coming under the description of preachers of Christ's holy gospel, who in the terms of the declaration required by the statute 19 Geo. III. c. 44, are Christians and Protestants, and believe the Scriptures of the Old and New Testament to contain the revealed will of God, and who receive the same as the rule of their doctrine and practice.

Sir *L. Shadwell*, V. C., was of opinion, that no persons who denied the divinity of our Saviour's person, and who denied the doctrine of original sin as it is generally understood, were entitled to participate in Lady *Hewley's* charity, and that all the trustees who held those tenets must be removed; and although there was no objection to a trustee who was a member of the church of England, it was decided that he ought not to continue in the trust (*u*).

(*u*) It was declared that ministers or preachers of what is commonly called Unitarian belief and doctrine, and their widows, and members of their congregations, and that persons of what is commonly called Unitarian belief and doctrine, are not fit objects of, and are not entitled to partake of the charities of Dame *Sarah Hewley* in the pleadings of this cause mentioned; and the relators by their counsel having now made an offer to allow defendant J. P. H. to remain a trustee of the said charity, and the said defendant not having by his counsel accepted such offer, this court doth decree that the said J. P. H. and also all the other defendants be removed from being trustees, and subtrustees, or managers, respectively, of the said charities; and it was referred to the master to appoint proper persons to be trustees, and subtrustees, or managers thereof respectively, in the room of the said defendants, who were ordered to convey, assign, and transfer the trust estates and funds belonging to the said charities vested in them, with the approbation of the said master, to such new trustees so to be appointed, to, for, and upon the several trusts, and to such uses as are expressed and declared of and concerning the same; and they are to declare the trusts thereof accordingly, and such conveyances and assurances are to be settled by the said master; and it was referred to the said master to take an account of the rents and profits of the said

This case having been very fully argued on an appeal against the vice chancellor's decision before Lord *Lyndhurst*, when lord chancellor, assisted by Mr. Justice *Patteson* and Mr. Baron *Alderson*, the latter, in delivering his opinion (*w*), observed :—" It was clear from all the documents that had been furnished, that the persons to be benefited by the charity, were to be dissenting ministers, and not persons of the established church. The question then was, who were the dissenters, according to the intent and meaning of Lady *Hewley*, as expressed in the deeds of trust? In the trust for the relief of poor widows, who, from calamity or other cause, might be reduced to indigence, she expressly states that she expects the recipients should entertain and believe certain doctrines. What, then, were those doctrines? Surely they were those which she entertained herself; there was no reason whatever to doubt that such was the case. She had given the most particular directions in the case of the pious widows who were to be the inmates of the almshouses. She stated that they must, previously to admission,

charity estates, and of the funds belonging thereto received by the said defendants, or any or either of them, or by their or any or either of their order, or for their or any of their use, since the 25th March 1830; and in taking the said account, the said master is not to disturb or disallow the distribution made of the said rents and profits by the said defendants, or any or either of them, in or about the month of May, 1830, to whom it shall appear that they have distributed the same; and it was referred to the said master to tax all parties their costs of this suit up to that time, as between solicitor and client, which were ordered to be paid out of the charity funds; and it was referred to the master to settle a scheme for the application of the residue of the charity funds. —*Attorney General* v. *Shore and others*, 23d Dec. 1833, Reg. lib. A. 1833, fol. 372, 373.

(*w*) *Gray's Inn Hall*, 5th Feb. 1836. The case was argued before them in April 1835, but was not completed when Lord *Lyndhurst* resigned the great seal, and judgment was given at the request of both parties. The argument before Lord *Brougham* in June, 1834, was not finished when his lordship retired from the chancellorship. There was much discussion on the state of religious opinions at the time of the foundation of the charity, and the gradual progress of Unitarian doctrines. See History and Present Legal Position of the English Presbyterians. 8vo. 1834.

be able to repeat the Lord's prayer, the creed, the ten commandments, and Mr. *Bowles's* catechism, and that they must regularly attend some place of divine worship. The question then was, what was the class of persons? Although it was clear that it was confined to Protestant dissenters, at the same time it was clear that it was not to be confined to one class, for it expressly stated that they were to attend "some protestant place of worship." It was also clear, that although it was confined to persons differing in opinion on certain points, yet it was also requisite that they should agree on certain other points. From the directions Lady *Hewley* had given with respect to the almshouses, he thought that it was clear that those elementary points were the doctrines found in the Lord's prayer, the creed, the ten commandments, and *Bowles's* catechism. It had been argued that it was merely meant that they should get them by heart, and not that they should be believed; but he thought that the intention was that those doctrines should be accepted as a rule of faith. The question then was, what were the doctrines here implied? They all agreed as to the Lord's prayer and the ten commandments. Perhaps the apostles' creed, although received by Christians, might be taken as an instance of the difference of doctrine to which he had alluded. It was not, he believed, adopted by that class of persons who did not admit a belief in the divinity of Jesus Christ: it might therefore be taken as a test as to the intentions of the devisor. In the creed, the expressions were used, God the Father; secondly, God the Son, the Redeemer of all mankind; and thirdly, God the Holy Ghost, who proceeded from Father and Son, &c. Thus the belief in the Trinity was clearly acknowledged. These would be considered, then, as essential points. The Presbyterians, at the period when this lady lived, did not appear to think it desirable to be bound with tests or creeds, but to rely on the words of Scripture. In accordance with this feeling, Mr. *Baxter*, when an union was suggested between the established church and the Presbyterians, recommended that all that should be required as a test, was, that

a person should express his belief in the Lord's prayer and the ten commandments, and then be received. It was objected to this, that by having such a test, they would admit both Papists and Socinians. He observed, that he did not think there was sufficient ground in the objection; he did not consider it desirable that they should confine admission to a certain rule of faith, but he thought it sufficient, if, when they found that improper persons had been admitted, they might call them to account for what they preached or wrote. But to return to the tests specified in Lady *Hewley's* trust deed, with respect to the recipients into the almshouses. The view which he had expressed with reference to the apostles' creed, seemed to have been taken up and adopted in the latter articles of Mr. *Bowles's* catechism. All divines to whom reference had been made with respect to this catechism, stated that it was essentially Trinitarian, and could only be assented to by those who acknowledged the divinity of the Lord Jesus Christ, and a belief in the doctrine of original sin. Nothing had been shown on the other side to alter the evidence on this point. This was also the opinion which his learned brother and himself had adopted from reading the catechism fairly. Upon the whole, therefore, they thought that Lady *Hewley* intended that only those should be admitted to her almshouses, to whom the doctrines contained in the creed and the catechism were acceptable, and who were prepared to take it as a rule of faith. Now, this proviso applied to the persons in the fourth class of the trust deed of 1704. The question was, did she not intend that the other classes, as well as this, should be composed of a particular description of Christians? Certainly the trustees now acting could not come within the same class as those who had to believe in the doctrines enjoined by Lady *Hewley* to those to be received into the almshouses. The meaning of the expression Lady *Hewley* used with regard to the preachers—poor and godly, was explained by the sense in which it was used in the other passage. It appeared to his learned brother and himself, that many circumstances tended to show that the doctrines enjoined in the case he had just mentioned, were those entertained by

Lady *Hewley*, and that she was anxious for their adoption. It was not likely that this lady, who was manifestly so anxious for the promotion of religion, would wish for the promotion of opinions differing from, and, in some respects decidedly opposed to, most of those entertained by herself. Under these circumstances, there could be little doubt that the words "poor and godly preachers of Christ's holy gospel," and also the provision for the education of persons to preach the gospel, intended to imply that they were to profess the same doctrines as herself. This opinion was confirmed in considering the peculiar language of Lady *Hewley's* will, the state of the law and public opinion at that time; and also by recollecting that the doctrines she enjoined to the inmates of the almshouses were those professed by the great body of the dissenters of that time. The defendants had failed in their attempt to prove any such catholic intention as had been attributed to Lady *Hewley*, and which was inconsistent with this case, because she had strong fixed religious opinions. Upon the whole, he thought that the decision of the vice chancellor in this case was right.

Lord *Lyndhurst* concurred in the opinion delivered by the learned judge, and said, in all charities, he thought there could be no doubt, that it was the duty of the court to give effect to the intention of the testator, provided that could be done without violating any rules of law. This had been the uniform practice, and the principle on which the Court of Chancery had always acted. When the terms of the trust deed were clear and precise, the course of the parties or the court was free from difficulties. If, on the other hand, terms, obscure, doubtful, or equivocal in themselves or in their application, were used, then resort must be had to external circumstances, to see what were the intentions of the devisor, and in order to direct them to be carried into effect. Each case of this description involved a question of evidence and of fact, which must vary in each particular case. The case of the *Attorney General* v. *Pearson* (*x*) had been decided by a learned judge of greater experience in courts of equity than

(*x*) 3 Mer. 353; *ante*, pp. 744—747.

any person now living, and the principles laid down in that judgment were clear and precise, and would govern decisions in similar cases. In the present case the first question was, what were the directions in the trust deeds? It was admitted on both sides that the bequest did not include preachers of the established church. It was agreed that they were not included, however godly and pious they might be. The terms godly and pious, therefore, must be taken with some limitation and restriction. What, then, were these limitations? The first question was, what were the particular religious opinions of Lady *Hewley*, the founder of this charity? There could be no doubt that she was a Presbyterian. Indeed it was a matter of history that she was a member of that religious class. It was admitted even in the answer of two of the trustees, and proved by evidence, that she attended a chapel where acknowledged Presbyterian ministers preached. Her adviser and executor was a person of that class. The question then arose, what were the doctrines of the Presbyterians at that time? He thought there could be no doubt as to this point. From all the evidence that had been adduced, it appeared that the Presbyterians at that time only objected to those articles of the church which related to its forms and discipline. It did not appear that there was any essential difference between the members of the establishment and the Presbyterians as to doctrinal points. There could be no doubt that the Presbyterians of that day were believers in the doctrine of original sin, and also in the Trinity. In the articles of agreement between the Presbyterians and Independents, in 1691, it was expressly stated that they each believed in certain doctrines specified in some of the articles of the church of England, and among them were the doctrines of original sin and the Trinity. He thought these articles were decisive as to what were then the general opinions of the Presbyterians. There could be no doubt that they believed in the doctrine of the Trinity. If further evidence were wanted on this point he would refer to the act of toleration. It was well known that many of the Presbyterians were consulted in drawing up the toleration act, and they were satisfied with its provi-

sions. By the 17th section of that act those persons were excepted from its operation who denied the doctrine of the Trinity (*y*). The whole of the evidence tended to show that the great body of the Presbyterians at that time, namely, the end of the seventeenth or the commencement of the eighteenth contury, as well as the great body of the Independents, believed in the Trinity as well as the doctrine of original sin, as laid down in the articles of the church of England. Having come to this conclusion, the question was, was Lady *Hewley* an exception to the general rule—an exception as to believing in the doctrine of the Holy Trinity and original sin? It appeared that she was a Presbyterian when she established this charity, and that the general doctrines of that class of Christians were such as he had stated. It, therefore, was incumbent on the respondents to prove that she was an exception to the general rule. But what were the probabilities of the case? There could be little doubt that the doctrines of the Unitarians were then listened to with feelings of aversion and something like disgust. Lady *Hewley* was a person advanced in life, and was known previously to have been a Trinitarian. Was it, therefore, probable that she had changed her opinion? There was, also, another circumstance connected with the situation and character of Lady *Hewley*. She had attracted great attention, and was well known for her great piety, and it must have become known to us, as a matter of history, if she had adopted the opinions of the Unitarians. But it would not be sufficient to allow the question to be decided on the probability of the case. It was the opinion of witnesses of the greatest intelligence, that this lady was a believer in the doctrine of the Trinity. One of the defendants stated his belief, that very many Presbyterians were Trinitarians, and admitted, that from the chapel she attended, his opinion was, that she was not what was called a Unitarian; and it was not probable, that the minister of that chapel, who was a man of character, would have subscribed the declaration enjoined

(*y*) *Ante*, p. 102.

by the toleration act if he was a Unitarian. That minister preached the funeral sermon of Lady *Hewley*, in which there was very strong evidence that she was a Trinitarian. All these circumstances led him to the conclusion that she did not entertain Unitarian opinions. Then there was the evidence furnished by Mr. *Bowles's* catechism. The doctrine of original sin was laid down in the catechism in the most precise terms. He agreed with the learned judge in thinking that Lady *Hewley* would not require a qualification with respect to the almshouses, which she did not think necessary as regarded the other participators in her charity. He had gone through all the evidence of the case with the greatest attention, and this had satisfied his mind irresistibly, that she was of the class of Presbyterians which believed in the Trinity. They then came to the question, what was meant by poor and godly preachers of Christ's holy gospel? Was it possible to come to the conclusion, by any of the rules of reason, that she intended to found a chapel and assist and educate preachers of doctrines directly at variance with her own? These variations were not on trifling matters, but on points which had ever been regarded by every class of Christians, and certainly by herself, as of the utmost importance. But this was not merely her own language, but was also that of Mr. *Wellbeloved*. He had stated in one of his sermons that they could not be regarded as non-essential points, and that he knew no class of Christians but the Unitarians who did not regard them as essential. Was it to be supposed that this pious lady would bestow large funds to promote the preaching of doctrines which differed from those she entertained on points which must be considered as essential? They must have some strong facts, or hear some strong arguments, before they would be justified in arriving at such a conclusion. On the question of fact he believed that it was extremely improbable, and, indeed, almost impossible, that Lady *Hewley* could have done so. His lordship then adverted to the act against blasphemy, passed six years before the first of the deeds of Lady *Hewley* for the foundation of

the charity. It was clear from that act (*z*), that the impugners of the doctrine of the Trinity were then regarded as blasphemers, and as being guilty of detestable crimes. If those who taught or preached such doctrines were subject to punishment, it also was unlawful, of course, to give money for preaching or teaching them. The general rule was this, that when a deed is capable of two constructions, that shall be adopted, which is consistent with the law, and not that construction which is directly at variance with the law. When, therefore, they could put a construction on the deed consistent with the law, they could not presume that the intention was to promote the preaching of doctrines directly contrary to the law. It would be contrary to every rule of legal construction to pursue such a course. It had been argued at the bar that this law had been repealed, and that the repeal would make an alteration as to the construction of the deed. He did not think that the case would be affected in the slightest degree by the alteration of the law. The simple question was, what doctrines Lady *Hewley* intended, at the time of the gift, to encourage the preaching of? There was no difference, in his opinion, because the law had been changed a century after. On these two grounds that this pious lady did not intend that her estate should be devoted to the preaching of doctrines directly at variance with her own, nor to make a disposition which was illegal, his lordship thought that she did not intend to benefit Unitarians. It had been said that Lady *Hewley* entertained generous and liberal opinions. All, however, that had been said on this point were wide and general statements. He repeated that, as a preliminary point, this lady was in her belief a Trinitarian, and that she never could have intended that her bounty should be applied to promote the preaching of doctrines directly opposed to those she entertained. He, therefore, concurred with his learned friends in the conclusion at which they had arrived.

The next question for consideration was, by whom these

(*z*) 9 & 10 Will. III. c. 32; *ante*, p. 102.

funds were administered, and in what way. Both the trustees and the sub-managers proved to be Unitarians. This had not been contradicted, and it was clear that they were believers in Unitarian doctrines. There certainly was an exception as to one, who was a member of the church of England. The question then was, how had the funds of the charity been applied by the trustees, and in what manner they had discharged the important duty intrusted to them? The misapplication of the funds, for a long series of years, would be a sufficient ground for removing the trustees; but it might be said that they had acted from error in judgment. It might be so; but, looking at the evidence in the case, he felt bound to come to the conclusion that there had been a strong and undue leaning in the expenditure of the funds towards persons professing Unitarian doctrines. For the vacancies that occurred in the body of trustees were filled up in a way which justified that opinion, and, in fact, the control of the funds of the charity was in the hands of those who entertained Unitarian opinions. Another circumstance was, almost all the students for preachers under this charity had been sent to *Manchester College, York*, which was substantially a Unitarian institution. The question, therefore, was not whether these persons had misapplied the funds for particular purposes, but whether they had not a strong bearing and bias towards opinions at variance with those entertained by the founder of the charity? Therefore, looking to what had been done and also regarding what might hereafter arise, he came to the conclusion that it would be dangerous to leave the control of the funds and the management of the charity to a class of persons who entertained certain opinions essentially different from those which Lady *Hewley* founded this charity for the purpose of advancing. He thought, therefore, that the vice chancellor was correct in directing that the trustees should be removed, and considered it to be his duty to determine that the judgment of the vice chancellor be affirmed (*a*).

(*a*) *Attorney General* v. *Shore*, Reg. lib. A. 1834, fol. 1094.

2. *Of the election and removal of dissenting ministers.*] The policy of the established church has been, by giving the minister an estate for life in his office, to render him, in a certain degree, independent of his congregation. But the policy of that rule has not been extended so as to govern the decision of a court of equity in the case of a protestant dissenting minister, where the trust which the court is called upon to establish, is otherwise constituted. Therefore, if the court finds that according to general usage among certain classes of persons dissenting from the establishment, their ministers are appointed for limited periods, or made removable at pleasure; a court of equity, though not disposed to struggle hard in support of such a plan, would be bound, if called upon for the purpose, to carry it into effect (*b*.) The question as to the right to elect persons as dissenting ministers, must, in the absence of express provision in the deed or special agreement between the parties upon the subject, be decided by established usage; and it is sometimes referred to the master to inquire and state the usage of Protestant dissenters as to the election of their ministers and the duration of their office.

The cases on application for writs of mandamus to admit or restore dissenting ministers, are stated in a preceding part of this work (*c*).

It seems, that in the absence of any express provision on the subject, that the legal act of appointing a minister of a dissenting chapel, is to be decided by the votes of the majority of the congregation; if, however, the parties cannot agree as to the election of a minister and of trustees, the master will be directed to inquire, who, according to the nature of the establishment, are entitled to propose trustees and elect a minister, and to approve him when elected (*d*).

Where persons, who were merely hirers and occupiers of

(*b*) *Attorney General* v. *Pearson*, 3 Mer. 402, 420.

(*c*) *Ante*, pp. 383—385.

(*d*) *Davis* v. *Jenkins*, 3 Ves. & B. 154.

seats or pews in a dissenting meeting-house, which was held in trust for the use of the congregation (which had always been in spiritual connexion with "the presbytery of the Scotch church in London"), but who did not take the sacrament there, had been excluded from voting at the election of a minister to officiate in the meeting-house, an application for an injunction to restrain the individual so elected from acting as minister, or receiving the emoluments attached to his office, was refused with costs (*e*).

In many cases, dissenting ministers are mere tenants at will to the trustees of chapels; the consequence is, that they may be turned out by ejectment after a demand of possession. Thus, on an ejectment to recover from the defendant, who had been elected minister by the members of a dissenting congregation, a chapel and dwelling-house, which he was put in possession of by the trustees in whom the legal estate was vested, in trust to permit the chapel to be used, for the purpose of religious worship. The members of the congregation having become dissatisfied with some of the doctrines of the defendant, in consequence wished to remove him, and came to a resolution to that effect. The trustees demanded possession, and immediately served a declaration in ejectment. The defendant had an annual salary of 20*l.*, and objected that he was entitled to some notice to quit. The court decided, that the defendant being tenant at will only, the demand of possession was sufficient to determine the will, and that there was no authority in the law for the position that he ought to have been allowed a reasonable time for removing his goods. But it seems that a tenant, who, after the determination of his tenancy by a demand of possession, enters on the premises for the sole purpose of removing his goods, and continues there no longer than is necessary for that purpose, and without excluding the landlord, would not be considered a trespasser (*f*).

So in another case, where it appeared, that, in 1783, a piece

(*e*) *Leslie* v. *Birnie*, 2 Russ. 114. 10 B. & Cress. 721.
(*f*) *Doe* d. *Nicholl* v. *M'Keag*,

of land, with a meeting-house thereon, was conveyed to trustees and their successors, ministers of the respective meeting-houses therein mentioned, to the intent that the said building should be used as a meeting place or house for public and religious worship, by the society or congregation of Protestant dissenters called Presbyterians; and that they should permit the same from time to time to be used, occupied, and enjoyed as and for a meeting-house, place, or house for such public and religious worship, by such society or congregation of Protestant dissenters. The defendant had been, according to the usual practice, elected by the congregation minister of the chapel sixteen years before, and was then put into possession of the house and premises by officers acting under the authority of the trustees. At a meeting of the congregation, in 1828, it was determined by a large majority, that the minister should be changed, but no other minister had been elected. Possession of the chapel, dwelling-house and premises had been demanded of the defendant on behalf of the trustees, but he refused to quit. On an ejectment brought by the heir of the surviving trustee, in whom the legal estate was vested, it was contended that the plaintiff could not recover possession against the defendant so long as he continued minister of the chapel. That the defendant, having been duly elected to fill the office of minister of the chapel, had an office coupled with an interest, and continued to hold such office until another minister had been duly elected according to the usual course adopted on former occasions. It was held by the court, that the defendant had no other estate in the premises than that of tenant at will, which had been determined by the demand of possession, and therefore that the trustees had a right to the chapel, whatever remedy the defendant might possibly have in equity against them, if they had improperly turned him out (*f*).

An information and bill were afterwards filed in this case, by some of the congregation of the chapel, on behalf of themselves and the rest of the congregation having full com-

(*f*) *Doe* d. *Jones* v. *Jones*, 10 B. & Cress. 718.

munion in the chapel, for an injunction to restrain the heir at law of the trustee from obstructing the minister of the chapel in the free use and enjoyment of the premises, and of the pulpit, and in the performance of his religious duties there; for an account of the money received by the defendant on account of the rents, and to restrain the conveyance of the legal estate in the premises, and from proceeding in an action for mesne profits. It was referred to the master to inquire and state, having regard to the nature of the congregration to whom the chapel belonged, and the rules and practice of the congregation, whether the plaintiff had been properly dismissed from his office, with liberty for the master to state special circumstances, and to examine all parties on the record and members of the congregation as witnesses (*g*).

A person to whom the key of a chapel, open to various preachers, is delivered merely for the purpose of preaching, has not such possession as will enable him to maintain an action of trespass against the person in whom the legal estate in the chapel is vested; although it seems to be otherwise, where a party regularly and exclusively uses a chapel, and keeps the key in his possession, for the purpose of preaching (*h*).

Where a trust deed invests certain individuals with an authority, *quasi* visitors, to dismiss or suspend a regularly appointed minister, *at their own will and pleasure*, the courts cannot interfere, however improper the dismissal or suspension may be; if, however, it is provided, that the same shall

(*g*) *Attorney General* v. *Jones*, V. C., 19 March, 1835. It was stated in the answer to be the universal rule of Protestant dissenting congregations, in England and Wales, of the Presbyterian persuasion, for the congregation for the time being attending divine worship and being in full communion, in any chapel, to elect the minister of it from time to time, and to dismiss any such minister from his office, when dissatisfied with him, according to the majority of votes of the members of such congregation, which rule had always been observed. And that the minister in this case had been dismissed at such a meeting.

(*h*) *Revett* v. *Brown*, 2 Moore & P. 12; *S. C.* 5 Bing. 7.

be done according to certain *rules, constitutions,* and *regulations* specified in the deed, it must be made to appear that they are applicable to the particular case; and before the courts will lend their assistance to enforce the sentence, they will be satisfied that those rules, constitutions, and regulations have been complied with. It is doubtful whether the courts of justice in this kingdom will, under any circumstances, enforce the rules of a community established in a sister kingdom, which in that kingdom are not entitled to similar assistance (*i*).

Of the appointment and removal of trustees.] If new trustees have not been appointed according to the provision of the deed of trust, the vacancies must be supplied by the Court of Chancery. A meeting-house had been built in 1796, to be regulated according to a trust deed then executed; and in 1803, the site of the old chapel having been required for the purposes of the *London Dock* act, a new chapel was built on another spot, when a new trust deed was executed, differing from the former, by transferring the power of filling up vacancies amongst the trustees and committees, from the congregation at large to the surviving trustees and committees. This alteration was alleged to be conformable to the original resolutions of the congregation in 1796, from which the deed then executed had, in that particular, deviated. There were to be five committees and thirteen trustees, in whom the legal estate was vested, and, from time to time, on

(*i*) *Attorney General* v. *Fletcher*, cited in Beldam's Summary of Laws affecting Protestant Dissenters, p. 79. It has been decided, that a district committee of Wesleyan Methodists have power, according to the rules they have established, to suspend a minister from his office, to which he had been appointed by a conference of that persuasion. The Court of Chancery had jurisdiction in such case, because it concerned the execution of the trusts of a deed under which the chapel was held; but the court did not decide simply upon the trusts of the deed, but partly upon the understanding and agreement of the parties, as manifested by the rules and usage of Wesleyan Methodists with respect to their ministers. *Warren* v. *Newton*, Chanc. 25 March, 1835. See Warren's Chronicle of Methodism.

the appointment of new trustees, proper assignments were to be made. On a bill, filed by some of the members of this meeting-house, against the trustees and committees for the general regulation of its affairs, Lord *Eldon* said, if this stands on the first deed only, and was the case of any other trust, it seemed to him, that if they had not filled up the whole number of the trustees and committees, the power of the remainder was gone. The deed was on the principle which, he believed, governed most dissenting congregations, that the trustees and minister are to be elected; and it provides, that due assignments are to made from time to time. These persons could not associate others with them to act as trustees; they must be trustees or nothing. In such a case, unless it differs from all other trusts, the court would fill up the number, referring it to the master to appoint proper persons; and when appointed, would direct them to carry on the trusts of the deed. Having neglected to fill up the vacancies, there was no one then who had power, neither the congregation, nor any one else could fill them up; it must be done by the court (*k*).

It already appears, that trustees of one mode of religious belief will not be permitted to administer the trusts of an institution established for promoting doctrines of a direct opposite tendency (*l*). Lord *Eldon* said, with reference to a trustee who had not acted for many years, in consequence of his differing in opinion from the majority of the trustees with respect to the object of the institution, that such trustee could not be discharged without a regular proceeding on the part of the remaining trustees, to replace him by a successor; and if the other trustees had been endeavouring to divert the institution from its original purpose, the court would never permit a trustee to be discharged from his office for endeavouring to preserve the object of the institution (*m*).

Where a deed contemplates the event, that the trustees

(*k*) *Foley* v. *Wontner*, 2 Jac. & Walk. 245. See *ante*, pp. 736, 737.

(*l*) *Ante*, pp. 749, 752, 761.

(*m*) *Attorney General* v. *Pearson*, 3 Mer. 412.

"should change, or become of any other religion or persuasion whatsoever, contrary to, and different from, the said congregation," if the question, whether a trustee has been properly removed, comes before the court, in the execution of his trust, and that point depends upon whether the trustee has changed his religion for another different from that of the rest of the society, the court must necessarily inquire what was the religion and worship of the society from which he is said to have seceded, for the purpose of ascertaining whether the charge has been substantiated (*n*).

SECTION VI.

Of the Nomination of Objects by Trustees.

THE trustees, to whom the testator gave the direction and management of a school founded by him, were held to be entitled to nominate and appoint the scholars (*o*).

A lectureship was founded, with a salary of 50*l. per annum*, charged upon lands, to be paid to the lecturer so long as he should attend the charge of diligent preaching there once every Sunday, unless hindered by necessity; and when the lectureship should be void by death, removal, or other departure, then *the trustees were to appoint a new lecturer*. A lec-

(*n*) *S. C.* Ibid. 413.

In the *Attorney General* v. *Shore* (*ante*, pp. 750—752) the trustees were required to declare, upon oath, whether they rejected, as unscriptural, the doctrine of the Trinity—the divinity of Christ—the personality of the Holy Spirit—the forgiveness of sins through the atonement of Christ—and of original sin. The defendants objected to these questions, contending, that as the charity which they administered was not restricted, a general profession of Christianity was sufficient; and they answered, "we receive the scripture as a sufficient rule of faith, and interpret it in that sense in which we believe it to be true." On exceptions being taken to this answer for insufficiency, it was held by Lord *Brougham*, that the defendants must answer more specifically as to their religious belief. Chancery, 8 Aug. 1831.

(*o*) *Attorney General* v. *Dean and Canons of Christ Church*, Jac. Rep. 486; *ante*, pp. 351, 352.

turer was appointed by the trustees expressly for life; but being much in debt, he had gone abroad, where he remained many years, and during his absence, the trustees appointed another lecturer. On a bill by the first lecturer for an account of the salary, it was held that the lectureship was avoided by the plaintiff's absence, and the necessity of absenting himself, by reason of his debts, was not the necessity intended by the founder to be an excuse for his absence; and though he had been expressly appointed for life, yet he was subject to the terms imposed by the founder; for the trustees could not alter the terms and nature of the trust, and the first appointment was superseded by the second, without any other act (*m*).

Where a party, seised of manors and lands in fee, granted a rent charge in fee towards the support of old men, and afterwards granted the manors to a third party, on a question whether the grantee of the land and his heirs, or the heir of the founder, had the right of nominating the objects of the charity, it was held that such right was incident to the founder and his heirs, or those whom he should appoint; for the rent charge, being an independent and collateral thing, was not incident to the reversion of the lands as a rent service; but the court allowed to the owners of the lands, who had enjoyed the nomination of the objects for upwards of sixty years, all the payments they had made to the poor, although they were nominated by such owners (*n*).

The founder of an almshouse and his heirs have the right of nominating the almspeople, but may forfeit it by a corrupt or improper nomination of such as are not fit objects of the charity, or by making no nomination at all; but this neglect of nomination must be after such time as the founder or his heirs have had notice of the vacancy (*o*).

The court will not permit the general intention of the

(*m*) *Phillips* v. *Walters*, 2 Eq. Abr. 198, pl. 4; *S. C.* Vin. Abr. Charitable Uses (F) pl. 14.

(*n*) *Attorney General* v. *Rigby*, 3 P. Wms. 145. See 2 Ves. jun. 389.

(*o*) *Attorney General* v. *Leigh*, 3 P. Wms. 146, n.

donor to fail, where certain directions with respect to the nomination of objects have failed through the neglect of the parties having the right of nomination (*p*).

In the *Attorney General* v. *Boultbee* (*q*), it appeared that

(*p*) *S. C.* stated from the Register's Book, by Sir *R. P. Arden*, M. R., 2 Ves. jun. 389, 390.

(*q*) 2 Ves. jun. 380. In this case, A. B., in 1653, conveyed a messuage, tithes, and several other hereditaments, to trustees in fee, in trust after his decease, to permit the vicar of P., for the time being for ever, *if he should be settled there by the nomination and appointment* of A. B. in his life, *or of the trustees, or major part of them, or such other persons who, for the time being, should have the freehold and inheritance, and no other,* to dwell in the said messuage, and upon trust to establish a school in P., and apply the rents of all the said premises for the support thereof, as therein directed, or to such other pious and charitable uses as A. B. should declare by writing, &c.; and if no such declaration, then to dispose of the rents, either for the increase of the maintenance of the vicar of P. for ever, or of the school, *or to any other such pious and charitable uses as the trustees, or the majority, should deem most expedient,* and most likely to be continued in perpetuity. A. B. then, by an entry in a book (which was considered a sufficient declaration of his intent), reciting the conveyance, declared that the messuage should, for ever thereafter, be for the habitation of the ministers of P., and for the increase of their maintenance he appointed all the tithes of a piece of land, part also of the premises in the deed, "provided that such minister be settled and placed in such manner as in the said deed is required, but not otherwise." In 1779, the then vicar being very old, the trustees, by a memorial to the Chancellor (the presentation being in the crown) requested, that on a vacancy, his lordship would appoint the clergyman recommended by them. On 20th Oct., 1787, the vicar died. Before his burial, one of the trustees, by letter, requested the Chancellor to wait a short time for the recommendation of the trustees. No farther step being taken by the trustees, the Chancellor, at the end of two months, without any recommendation from the trustees, issued a *fiat* for the presentation of W., who was instituted 17th Jan., 1788, and then inducted. The trustees refusing to admit W. to the benefits of his trust, an information was filed at his relation. The trustees, by their answer, stated, that one of their number being absent, they had deferred a meeting till 22nd Dec., 1787, and that they did not then make any recommendation, because they found the relator was presented; they also stated, that since the founding of the charity, none of the vicars were presented but by the procurement or recommendation of the trustees, except one, and he was not permitted to enjoy the charity,

the donor had two objects in view, one to provide an additional and competent maintenance for the vicar of a parish, the right of presentation to the vicarage being in the crown; the other, to secure to himself, or his trustees, the recommendation or approbation at least of the person to be vicar. The trustees of the charity having neglected, for two months after the death of the former vicar, to observe the donor's direction by recommending a person to the Lord Chancellor, a vicar was instituted on his presentation, without the recommendation of the trustees, who refused to admit him to the benefit of the trusts for the vicar; but on an information being filed by such vicar, the court held, that such neglect of the trustees should not disappoint the donor's intention, and that the vicar was entitled to the benefits intended for him, although the condition imposed by the donor had not been complied with.

The hospital of *St. Catherine* was founded by charter of Queen *Eleanor*, dowager of Henry III., confirmed by charters of Edward II. and Edward III. which reserved the appointment of a master to the queen, and to all succeeding queens of England. On an objection, that the limitation to the succeeding queens was void, because such a desultory kind of inheritance could only be limited by act of parliament, *Hale*, C. J., distinguished the case from that of an advowson, and held that of the patronage of an hospital newly founded, there can be no precedent right, and therefore at its first institution it might be limited, as the king pleased, like the case of a rent *de novo* (*r*).

but was at last, by way of settling disputes, allowed 5*l.* a-year thereout; they contended, therefore, that the relator was not entitled to the benefit intended for the vicar of P., and said, that they were preparing, according to their power, to apply the fund to other charitable purposes. See *Joyce* v. *Osborne*, Nels. Ch. C. 40; Vin. Abr. Charitable Uses (D) pl. 2.

(*r*) *Atkins* v. *Mountague*, 1 Cas. in Ch. 214. See 2 Dugdale's Monasticon, 2 vol. 460. Although the right of appointing the master of the above hospital is in the queen consort, it does not determine by her becoming queen dowager; but the office of master cannot be granted in reversion, although it is a lay hospital. *Lord Brounker* v. *Atkins*, Skinn. 14. See *ante*, p. 408, n. (*x*).

It has been already shown, that where trustees have a general power of placing and displacing officers, and of making bye-laws at pleasure, that the power of amotion may be exercised without assigning any cause. The words "*shall and may*," in the statutes of the charity, were construed imperatively for must (*s*).

It may be proper to observe, that a subscriber and member of a committee who attends their meetings for managing the concerns of an hospital is liable to the creditors of the hospital (*t*); and the proper question for the consideration of the jury is, whether the defendant had so acted as to induce the plaintiff to believe that he was to look to the defendant and the other members of the committee for payment.

But the secretary of a charitable institution which has been dissolved, cannot maintain an action against the committee by whom he was appointed, for his salary, without producing the agreement on which he founds his claim. The plaintiff had been employed as secretary, under an appointment made in pursuance of a resolution of the committee for managing the affairs of the society, which was entered in a book remaining in the hands of the plaintiff, as secretary, but to which entry the plaintiff was no party, nor did it appear to have been expressly brought to his notice. The society having been dissolved, the plaintiff quitted the employ, leaving this book in the office. In an action against three of the committee for the arrears of salary, it was held that the plaintiff was bound to produce the book, inasmuch as it would have shown the terms on which he had been engaged, and that a notice to the defendants to produce it, was not sufficient to entitle him to give secondary evidence under the *quantum meruit*, the book appearing not to be in the possession of the defendants, but in that of another member of the committee, without the knowledge or control of the defendants (*u*).

(*s*) *Attorney General* v. *Lock*, 3 Atk. 164; *ante*, pp. 370, 371.

(*t*) *Burls* v. *Smith*, 5 Moore & P. 735; *S. C.* 7 Bing. 705.

(*u*) *Whitford* v. *Tutin*, 4 M. & Scott, 166; *S. C.* 10 Bing. 395; 6 Carr. & P. 228.

CHAPTER VIII.

OF THE LIABILITY TO, AND EXEMPTION FROM, THE PAYMENT OF TAXES IN RESPECT OF CHARITIES.

SECT. I.—*Of the Liability of Charitable Bequests to the Payment of Legacy Duty.*

II.—*When Indentures of Apprenticeship are, or are not, exempt from Stamp Duty; and what is not a Public Parochial Fund.*

III.—*When Charitable Institutions are, or are not, exempt from Poor and Church Rates.*

IV.—*Of the Provisions respecting Charities in the Statutes relating to the Land Tax.*

SECTION I.

Of the Liability of Charitable Bequests to the Payment of Legacy Duty.

IT has long been the general practice to pay the legacy duty on bequests to hospitals and other charities, although there does not appear to have been any judicial decision upon the subject of their liability until recently (*a*).

The first statute imposing duties on legacy receipts was 20 Geo. III. c. 28, which enacted, that a duty should be paid upon every receipt for any legacy, or part of a personal estate, divided by force of the statute of distributions, or the custom of any province or place. The 23 Geo. III. c. 58, and 29 Geo. III. c. 51, increased the amount of these duties, adopt-

(*a*) *In re Wilkinson*, 1 Cr. Mees. & Rosc. 151; *S. C.* 4 Tyrw. 513; *re Franklin's Charity*, 3 Younge & Jerv. 547; *S. C.* 3 Sim. 147.

ing similar language. The 36 Geo. III. c. 52, enacted that these duties should cease, and repealed so much of the before-mentioned statutes as related to them; and proceeded to impose fresh duties, upon the same principle, and in nearly similar terms, except as to amount, as are contained in the third schedule to 55 Geo. III. c. 184, the statute now in force. The 7th section provides, "that any gift, by any will or testamentary instrument of any person dying after the passing of this act, which shall by virtue of such will or testamentary instrument have effect or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of as he or they shall think fit, shall be deemed and taken to be a legacy within the intent and meaning of this act, whether the same shall be given by way of annuity or in any other form." The 11th section provides, that "if any benefit shall be given by any will or testamentary instrument, in such terms that the amount or value of such benefit can only be ascertained from time to time by the actual application for that purpose of the fund allotted for such purpose, or made chargeable therewith, or if the amount or value of any benefit given by any will or testamentary instrument cannot, by reason of the form and manner of the gift, be so ascertained that the duty can be charged thereon under any other of the directions herein contained, then and in every such case such duty shall be charged upon the real sums of money or effects which shall be applied from time to time for the purposes directed by such will or testamentary instrument, as separate and distinct legacies or bequests, and shall be paid out of the fund applicable for such purposes, or charged with answering the same."

By 39 Geo. III. c. 73, it is enacted, "that after the passing of that act, no legacy consisting of books, prints, pictures, statues, gems, coins, medals, specimens of natural history, or other *specific* articles which shall be given or bequeathed to or in trust for any body corporate, whether aggregate or sole, or to the society of *Serjeants' Inn*, or any of the inns of court or chancery, or any endowed school, in order to be kept

and preserved by such body corporate, society, or school, and not for the purposes of sale, shall be liable to any duty imposed on legacies by any law then in force."

The 55 Geo. III. c. 184, schedule part 3, contains an exemption from duty of "all legacies which were exempted from duty by the statute 39 Geo. III. c. 73, for exempting certain specific legacies given to bodies corporate or other public bodies, from the payment of duty."

The 55 Geo. III. c. 184, schedule part 3, provides, that, for every legacy, residue, or share of residue, of the amount or value of 20*l.* or upwards, where any such legacy, residue, or share of residue, shall have been given to or for the benefit of a child, a duty shall be paid of 1*l. per cent.*, an increased duty for more distant relatives, "and where any legacy, &c. shall have been given to or for the benefit of any person in any other degree of collateral consanguinity than above described, or to or for the benefit of any stranger in blood," then a duty after the rate of 10*l. per cent.* And the schedule provides that all gifts of annuities, or by way of annuity, or of any other partial benefit or interest, shall be deemed legacies within the intent of this act.

Mr. Baron *Parke* observed, that, "considering the provisions of these statutes together, it seems clear, in the first place, that the legislature intended to subject all legacies above 20*l.* in value, to a duty, whether given to individuals, or to bodies corporate, or societies; for the statutes prior to the 36 Geo. III. in terms comprise all legacies, and though that statute, after enumerating those to persons in different degrees of consanguinity, mentions only legacies which shall be given, or shall pass to or for the benefit of any person in any other degree of collateral consanguinity, or any stranger in blood, and not all other legacies; yet taken in conjunction with the 39 Geo. III. c. 73, it clearly means to comprise not merely legacies to individuals, but to bodies corporate and societies. In the second place, it appears to be equally clear, that the persons, bodies corporate, or societies, who take the beneficial interest in the legacy, that is, those who actually receive the benefit, are ultimately to pay the duty. And in

the third place, that any benefit given by will, which shall by virtue of the will be satisfied out of the personal estate, is a legacy within the meaning of this act" (*b*).

The will of a testator, made in April, 1831, contained these words: "Finally, after my just debts and legacies are paid, my will and pleasure is, that all my money in bankers' hands, bills of exchange, &c. &c. be collected into cash, and laid out in the funds in the Bank of England, where I now have considerable property; and that my executors hereafter named, and their heirs and assigns, do receive the interest thereof at the bank half-yearly, and divide it among poor pious persons, male or female, old or infirm, in 10*l.* or 15*l.* as they see fit, not omitting large and sick families, if of good character." The executors had been called upon by the common rule, under stat. 42 Geo. III. c. 99, s. 2, to account for legacy duties, and the question was, whether legacy duty attached on the residuary bequest before stated.

Mr. Baron *Parke*, in delivering the judgment of the Court of Exchequer, said, the persons who take the beneficial interest in the residue, must be either the executors themselves or the individuals selected by them, or the whole body of poor and pious persons out of whom the selection was to be made. The executors had no beneficial interest in the legacy, their duty is simply to divide the annual interest among such poor and pious persons as they think fit in sums of 10*l.* and 15*l.* each. They can make no other appropriation or disposition of the money, and cannot, therefore, be charged as beneficial legatees. It remains, therefore, to consider, whether the individuals actually benefited, or the whole body of persons that may be benefited, are the beneficial legatees. It appears to us, that all poor and pious persons whatsoever cannot be considered as a society, or body of persons, or class, taking the benefit of this legacy. The whole body has no power or control over the fund, nor has any trustee or agent for them such power or control, nor has any individual falling under the description of poor and pious, any right what-

(*b*) *In re Wilkinson*, 1 Cr. Mees. & Rosc. 160; *S. C.* 4 Tyrw. 513.

ever to any portion of it. All he has is the chance of being nominated as a fit person to receive part of the money. We cannot think these persons are a body, taking as such the beneficial interest in the legacy; and we must, therefore, hold, that the individuals selected are the persons who take a benefit under the will, and are, consequently, liable to the duty, in those cases in which duty attaches; and the clause of the 36 Geo. III. c. 52, s. 11, (*c*) seems to us to be exactly applicable to this case. The result is, that such individuals will be liable to the duty where the sum received by each exceeds 20*l.*; and then, and not until then, the executors will be accountable, and bound to retain the duty according to the rate applicable to such person who receives the testator's bounty. By our present decision, we do not mean to question the legality of the practice of imposing the highest rate of duty on bequests to corporations or societies established for charitable purposes, or to individuals in trust for such societies. In such cases the corporation or society may not improperly be considered as taking the entire beneficial interest (*d*).

In another case, which it seems difficult to distinguish satisfactorily from that last cited, a testator bequeathed to the poor of a parish 50*l.* *per annum* for ever, to be laid out in bread to be distributed, by the minister and churchwardens, to the most needy objects in the parish; and the executors of the testator in pursuance of a decree of the Court of Chancery, transferred stock into the name of the accountant general, the interest of which was to be paid to the minister and churchwardens of the parish, to be applied for the charitable purposes of the will; it was held, that the legacy duty was payable, although the poor of the parish consisted of upwards of 820 persons, and no one person could receive more than the value of two shillings in bread, on account of the charity (*e*).

(*c*) *Ante*, p. 774.

(*d*) *In re Wilkinson*, 1 Cr. Mees. & Rosc. 142—162; *S. C.* 4 Tyrw. 513.

(*e*) *In re Franklin's Charity*, 3 Younge & J. 544; *S. C.* 3 Sim. 147.

SECTION II.

When Indentures of Apprenticeship are or are not exempt from Stamp Duty, and what is not a Public Parochial Fund.

THE 40 sect. of stat. 8 Anne, c. 9 (*e*), which imposed a duty on indentures of apprenticeship, expressly exempted from duty money given with apprentices put out at the common or public charge of any parish, or paid out of any *public charity*.

A voluntary annual subscription by divers inhabitants of a parish for putting out apprentice boys and girls brought up at a parish charity school, there being four trustees and a treasurer annually elected to manage the charity, who bound out poor children, was held to be a *public charity* within this act, although it was not permanent. The reason of the distinction between a public and private charity, being, that a private charity might be calculated to evade the act which a public one could not be supposed to be (*f*).

A bequest to *Clifton* (where the testatrix resided) of 50*l*., to be given as her brother thought fit, some of it to put out children apprentices, was held to be a public charity, although it was argued that it was a private charity, because it was left entirely to the discretion of the testatrix's brother, whether to put out apprentices with the legacy or not (*g*).

A binding with the consent of trustees of funds bequeathed for that purpose, though they do not execute, is exempt from duty (*h*).

(*e*) This act applies to indentures of apprenticeship made prior to the 10th October, 1804. The stat. 44 Geo. III. c. 98, and 48 Geo. III. c. 149, which made considerable alterations in these stamp duties, have been repealed by 55 Geo. III. c. 184.

(*f*) *Rex* v. *St. Matthew's, Bethnal Green*, Burr. S. C. 574, 1 Bott, 641, pl. 932.

(*g*) *Rex* v. *Clifton upon Dunsmore*, Burr. S. C. 697; 1 Bott, 641, pl. 933.

(*h*) *Rex* v. *Quainton*, 2 Maule & S. 238.

A pauper was bound apprentice by the trustees of a public charity. The master covenanted to find him meat, drink, apparel, washing, &c. Before the execution of the indenture, the father of the pauper, who was not a party to it, agreed with the master to find the pauper clothing and washing during the term, and he did so. It did not appear that the trustees were privy to this engagement. It was held that the indenture did not require to be stamped, because either the agreement by the father to provide clothes was not a thing secured to be given for the benefit of the master, within the stat. 55 Geo. III. c. 184 (*i*); or assuming that it was, then it was void as being a fraud on the trustees, who had bound out the apprentice on the faith that the master would provide clothes (*j*).

Where an apprentice, who had been bound by the trustees of a charity, in consideration of a premium paid by them, was assigned by the original master to a new master, in consideration of a premium paid by the new to the old master, it was held that the assignment, which was made without the privity or concurrence of the trustees of the charity, was not exempt from duty. By an indenture, in 1821, not stamped, a party was bound apprentice to a trade for seven years, at a premium of 15*l.* stated in the indenture to be paid to the master by the treasurer, appointed according to

(*i*) The stat. 55 Geo. III. c. 184, schedule part 1., *tit.* Apprenticeship, which imposes certain duties on indentures of apprenticeship, in respect of money or any matter or thing paid or given, or secured to be paid or given, for the use or benefit of the master or mistress, with or in respect of an apprentice, contains the following exemptions from all stamp duties: "Indentures, or other instruments for placing out poor children apprentices, by or at the sole charge of any parish or township, or by or at the sole charge of any *public charity*, or pursuant to the act of the 32nd year of his majesty's reign, (32 Geo. III. c. 57) for the further regulation of parish apprentices. And all assignments of such poor apprentices, provided there shall be no such valuable consideration as aforesaid given to the new master or mistress, other than what may have been or shall be given by any parish or township, or by any *public charity*."

(*j*) *Rex* v. *Aylesbury*, 3 B. & Adol. 569.

the testator's will (*k*) for the purpose of annually binding out poor apprentices; the premium was paid out of the rents of the trust estates, and the indenture was prepared by the clerk to the charity, and paid for by the charity. The master, at the request of the apprentice, after he had served about three years and a half, agreed to give to another master of a different trade, who agreed to take him for the remainder of the term, 6*l.* as part of the 15*l.* paid as a premium on the original binding. Neither the trustees nor the treasurer of the charity were parties to such agreement.

On a question whether the indenture required a stamp, either originally or upon the apprentice's changing his service, it was held, that the object of the will was, that every thing relating to the apprenticeship should remain in the hands of the trustees. A new arrangement was made both as to the service and premium, to which the trustees were no parties. Whatever exemption, therefore, belonged to the transaction originally, it was taken away when the master stood by himself, and a transfer took place with which the charity had nothing to do (*l*).

(*k*) *John Norman*, by his will, dated 19th February, 1720, devised certain estates to trustees and their heirs, upon trust (at certain intervals after the testator's death) to put to school, and at the age of fifteen to bind out apprentice to some trade, a son of some one of his or his first wife's relations, until the whole number of boys together in being, that should be thus put to school and provided for, should amount to thirty. And the testator directed, that as often as there should be a deficiency of the descendants of his or his first wife's relations, the trustees should put to school and place out apprentice, a son or sons of some inhabitant or inhabitants of *Beer Street* ward, or *Upper Conisford* ward, in *Norwich*, or of the parish of *Catton* in *Norfolk*; and the testator directed that at the end of sixty years after his decease, the number of boys should be increased by two, three, or four in a year, until it reached 120 of his or his said first wife's descendants, if they could be known or made out by his said trustees; and if not, of such others as aforesaid, out of *Beer Street* or *Conisford* wards, and *Catton*, if enough were to be had; if not, out of the neighbouring parishes in *Norwich*, at the discretion of his trustees; such children of strangers to be chiefly of such parents as had been reduced by losses, and had paid to church and poor.

(*l*) *Rex* v. *Inhabitants of Fakenham*, 4 Nev. & Mann. 553.

Money given by will for binding out apprentices is not a public parochial fund within the stat. 56 Geo. III. c. 139, s. 11 (*m*). Lands were devised for the relief of the poor of H., one half of the revenue to be employed for the relief of widows, the other half towards binding out apprentices. The rents were received by the churchwardens, and not mixed with the poor's rates, but kept in a distinct account. A parishioner of H. not receiving parish relief, applied to the churchwardens to provide him with means of apprenticing his son. The son was apprenticed, and the churchwardens paid the premium, costs of the indenture, and expense of clothing the apprentice, out of the charity fund; it was held, that it was not an indenture by which an expense was incurred by *public parochial funds* within the statute 56 Geo. III. c. 139, s. 11, and therefore not void for want of the approval of two justices according to that act. And in a similar case, where lands were devised to the churchwardens and overseers of L. and their successors, upon trust, to apply the rents towards educating twenty poor children, and a part thereof yearly towards apprenticing eight of such children, to be chosen out and allowed by the said churchwardens and overseers, and the principal inhabitants; it was held, that the last was not a public parochial fund within the meaning of that act. Lord *Tenterden*, C. J. in deciding the

(*m*) The stat. 43 Eliz. c. 2, s. 5, empowers the churchwardens and overseers, or the greater part of them, by the assent of any two justices of the peace, to bind out poor children apprentices where they shall see convenient, &c.

The 56 Geo. III. c. 139, s. 11, after reciting that the salutary provisions of the above act are frequently evaded in the binding out of poor children, and the premium of apprenticeship or a part thereof is clandestinely provided by parish officers, who are thus enabled to bind out many poor children without the sanction of the justices of the peace, enacts, "that no indenture of apprenticeship by reason of which any expense whatever shall at any time be incurred by the public parochial funds, shall be valid and effectual, unless approved of by two justices of the peace under their hands and seals, according to the provisions of the said act and of this act." See *Rex* v. *St. Paul's, Exeter*, 10 B. & C. 12; *Rex* v. *Mattishall*, 8 B. & C. 733.

case on general principles said, "in one sense, according to some decisions, the funds in both these cases are funds of public charities, because the bequest is general, and does not designate the individuals to be benefited. In another sense, they are parochial also, because they are left for the benefit of persons belonging to the respective parishes. Still the question is, in each case, whether the money be that of a *public parochial fund.* His lordship thought the case not within the mischief contemplated by 56 Geo. III. c. 139, s. 11. There is no clandestine appropriation of monies of the parish. The funds in question cannot properly be so called, in respect of the purpose for which they are collected, or the manner in which they are raised, since they are not contributed by the inhabitants of the parish. I think a public parochial fund must be one so contributed, or which is applicable to the general purposes of the relief of the poor. Estates devised for the relief of the poor generally, would come under this description; but in each of these cases there is a fund left by the bounty of an individual for a certain specified purpose, that is, for the benefit of a particular class of persons. It is not meant to go in relief of the general parish fund, or if so, only to a moderate extent. It does not appear that the intention was to relieve persons actually burdensome to the parish; there might be persons unable to bind out their own children, and therefore objects of this charity, who yet did not require parochial support, and in such cases the fund would be no relief to the parish. It appears to me also, that the donors in these cases never intended the objects of their bounty to be under the control of the justices of the peace, but that the charity should be, in the one case, at the disposal of the churchwardens, in the other (as respects apprentices), at that of the parish officers and principal inhabitants" (*n*).

(*n*) *Rex* v. *Inhabitants of Halesworth*, 3 B. & Adol. 717; see *Rex* v. *St. Peter, Herefordshire*, 1 B. & Adol. 916; *Rex* v. *Stoke Damarel*, 1 Mann. & R. 458; *S. C.* 7 B. & C. 563.

SECTION III.

When Charitable Institutions are or are not exempt from Poor and Church Rates.

THE nominal trustees or governors of an hospital are not rateable to the hospital itself, although poor rates had been paid in respect of part of the site before it was appropriated to the purpose of an hospital; the servants and objects of the charity, who have no control over the premises which they inhabit, are also exempt (*o*). In order to constitute such an occupation of property as to make it rateable to the poor, it is necessary not only that the person should have possession, but that he should such a control and dominion over the subject, as implies freedom from any paramount occupation, such as a farmer enjoys over his farm, and the master of a family over his house.

A person who dedicates his property to charitable purposes, without making any profit of it, is not liable to be rated; as where the owner of a house, which had previously been rated, pulled it down and built another house, in which ten poor girls were educated, maintained, and brought up at the donor's expense, and such poor girls, and a woman, provided by the donor, to superintend and instruct them, were the only inhabitants, and all vacancies were from time to time supplied at the donor's discretion (*p*).

A person employed by the *Philanthropic Society* to superintend the children at annual wages, under an agreement that she should have a dwelling-house free from taxes, &c., with certain other perquisites, and who might be dismissed at a minute's warning on receiving three months' wages, is not rateable to the poor as the occupier of the house provided by the society, she having no distinct apartments in the

(*o*) *Rex* v. *St. Bartholomew's Hospital*, 4 Burr. 2405; *Rex* v. *St. Luke's*, 2 Burr. 1055; 1 W. Bl. 249.

(*p*) *Rex* v. *Waldo*, Cald. 358; 1 Bott, 166, pl. 193.

house but a bed-chamber, and her family not being allowed to live there (*q*). An exemption in a private statute of 12 Charles II., of lands given to charitable purposes, "from all public taxes, charges, and assessments whatsoever, civil or military," extends to the poor rates (*r*).

The stat. 3 & 4 Will. IV. c. 30, after reciting that it was expedient that churches, chapels, and other places exclusively appropriated to public religious worship should be exempt from the payment of poor and church rates, enacted, "that from and after the first day of October, 1833, no person or persons shall be rated or shall be liable to be rated, or to pay to any church or poor rates or cesses, for or in respect of any churches, district churches, chapels, meeting-houses, or premises, or such part thereof as shall be exclusively appropriated to public religious worship, and which (other than churches, district churches, and episcopal chapels of the established church) shall be duly certified for the performance of such religious worship according to the provision of any act or acts now in force: provided always, that no person or persons shall be hereby exempted from any such rates or cesses for or in respect of any parts of such churches, district churches, chapels, meeting houses, or other premises which are not so exclusively appropriated, and from which parts not so exclusively appropriated such person or persons shall receive any rent or rents, or shall derive profit or advantage."

The second section provides, "that no person or persons shall be liable to any such rates or cesses because the said churches, district churches, chapels, meeting-houses, or other premises, or any vestry rooms belonging thereto, or any part thereof, may be used for Sunday or infant schools, or for the charitable education of the poor."

Before the above act, a building used for a chapel only, if a profit was made of it, was rateable to the poor (*s*). Although it had been held that the trustees of a quakers'

(*q*) *Rex* v. *Field*, 5 T. R. 587.
(*r*) *Rex* v. *Scott*, 3 T. R. 602.
(*s*) *Robson* v. *Hyde*, Cald. 310; *Rex* v. *Agar*, 14 East, 256.

meeting-house, of which no profit was made by the pews, &c., were not rateable (*t*).

By 9 Geo. IV. c. 40, s. 29, it is enacted, "that in all future rates, taxes, and levies to be made for any parish or place, in which any land or ground already purchased or to be purchased under the provisions of that or any former act, for the purposes of any county lunatic asylum, shall be situate, such land or ground with any buildings to be erected thereon, shall not be assessed to any such rates, taxes, or levies, at a higher value, and more improved rent than the same land or ground was, at the time of such purchase; nor shall any building or buildings, which under that or any former act has been or shall be erected on such land, be assessed to any house or window tax."

The application of the rent, paid by the occupier, to charitable purposes, does not exempt him. Thus, hospital lands are chargeable to the poor as well as others; for no man, by appropriating his lands to an hospital, can exempt them from taxes to which they were subject before, and throw a greater burthen upon his neighbours (*u*). The principle of exemption in certain cases is, that there is no occupier.

The comptroller of *Chelsea College*, who resided in it, was held to be rateable to the relief of the poor of the parish in respect of apartments held distinctly and *separately* for his own use (*v*).

So the porter and butler of a college are rateable for their dwelling-houses erected for them by and belonging to the college, if they have the entire use of them, without the college's intermeddling therewith (*w*).

The master of a free school, appointed by the minister and inhabitants of a parish under a charitable trust, who was the beneficial occupier of a house and garden, was held to be rateable, although they were enjoyed by him as a recompense

(*t*) *Rex* v. *Woodward*, 5 T. R. 79; 1 Nolan, 162. See *Rex* v. *Sculcoates*, 12 East, 40.

(*u*) 2 Salk. 527; 1 Bott, 125, pl. 154.

(*v*) *Ayr* v. *Smallpiece*, 1 Bott, 131, pl. 165.

(*w*) *Rex* v. *Gardner*, Cowp. 81.

for teaching. The house and garden were assigned by deed "for the habitation and use of the master and his family freely, without payment of any rent, income, gift, sum of money, or other allowance whatsoever, for or out of the same," which, together with certain lands and annuities, were given for the teaching of ten boys, sons of the meaner sort of the inhabitants of the parish. But, if the master had been put in merely to look after the pupils, and had not occupied the house, he would not have been rateable; but it appeared that he was the beneficial occupier of the house and garden (*y*).

So Lord *Rich*, having founded a corporation in the parish of F. for the relief of the poor there, granted to the corporation, and their successors, a messuage, twenty acres of land, and four of wood; and appointed the messuage for an almshouse for the dwelling and lodging of five poor and impotent persons, with a grave woman to attend them; the said six persons to have freely, during their lives, by the permission of the corporation, their dwelling-chambers and lodgings in the said almshouse, with the hall, kitchen, buttery, cellars, barns, and all profits and commodities to the said almshouse belonging; and, also, that the said corporation should permit them to have and occupy the said land for their cattle, and a rood of wood each year for firing; the persons elected, in case of nonconformity to the regulations of the charity, being liable to be put from his or her room or place, lodging and living, &c. as if the party so refusing were dead. Six persons, who had not been previously parishioners where the premises lay, possessed the said messuage, land, and wood, being of the annual value of 15*l.*, which were never rated before; keeping up a stock of cows, according to the founder's directions, and paying a labourer for making their hay and cutting their wood, both of which they disposed of to their own use. The visitor of the said almshouse had frequently granted them additional relief. The Court of King's Bench was of opinion, on a case stated by the sessions, that the alms-

(*y*) *Rex* v. *Catt*, 6 T. R. 332.

people were liable to assessment if the parish officers thought it prudent to rate them. For the property came within the general description of rateable property in the statute 43 Eliz. c. 2, which contains no exception of lands devoted to charitable purposes; and these persons ploughing, sowing and reaping for their own benefit, had every sort of occupation which any other person could have, and the smallness of the benefit cannot constitute an exemption (*z*).

The objects of a charity in the actual occupation of almshouses, paying no rent for the same, and removable at the pleasure of the patrons of the charity, are rateable to the relief of the poor in respect of their occupation. The master and wardens of the *Merchant Tailors' Company, London*, being patrons of a charitable establishment for the relief of the widows of poor freemen of the company, purchased land, whereon they erected, out of their corporate fund, thirty almshouses for the reception of such poor widows. The poor women resident in these houses, as objects of the charitable establishment, paid no rent for the same, and were removable at the pleasure of the master, wardens, and court of assistants of the company of *Merchant Tailors*. On a question, whether the inhabitants of these houses were liable to be rated, it was held that this case was not distinguishable from that last cited; and that although the objects of the charity were described as poor persons, yet that there is no distinction in the statute between such persons and others; if they are occupiers of property from which they derive a benefit, they are rateable (*a*).

The lunatic asylum at *York* was built, and the ground for it purchased, by voluntary contribution, and the property was conveyed to trustees, for the purpose of erecting thereon a *lunatic asylum*, and for such other purposes relative thereto as should be determined by the subscribers. The asylum was originally designed for parish paupers or other indigent persons; but the funds being insufficient, a limited number

(*z*) *Rex* v. *Munday & others*, 1 East, 584.

(*a*) *Rex* v. *Green*, 9 B. & C. 203; *S. C.* 4 M. & R. 164.

of persons were afterwards admitted, at certain rates of payment, varying from six shillings to three guineas a week. From this and other sources of revenue, the trustees, after paying all the expenses of the establishment, had accumulated, in five years, profits to the amount of 2,000*l.*, part of which had been laid out in buildings and purchases for the institution, and part continued to accumulate. All benefactors of 20*l.* or upwards were governors, and they exercised the entire control over the asylum and its funds. Neither the trustees nor subscribers derived any profit whatever from the institution. The trustees being rated to the poor for this asylum, appealed, on the ground that the asylum was not rateable by law, and even if rateable, that the trustees were not the proper persons to be assessed. But the court held, that, as profit was made by the reception of patients who could pay, the asylum was liable to be rated for it, and that the application of the profit when made was immaterial to the question of rateability; also, that the trustees, being, in law, the owners of the asylum, were properly rated; no other persons could be rated; certainly not the unhappy patients; and as to the servants, they were not the occupiers (*b*).

By the general highway act, 5 & 6 Will. IV. c. 50, s. 27, in order to raise money for carrying the several purposes of that act into execution, it is enacted, "that a rate shall be made, assessed, and levied, by the surveyor, upon all property now liable to be rated and assessed to the relief of the poor: provided that the same rate shall also extend to such woods, mines, and quarries of stone as had theretofore been usually rated to the highways" (*c*).

Church rates which have existed from time immemorial, are imposed upon the occupiers of lands or houses, upon principles resembling the rules in force for the making of poor rates, with the exception, that all property forming a part of the rectory, whoever may be the occupier, is ex-

(*b*) *Rex* v. *St. Giles, York*, 3 B. & Adol. 573.

(*c*) See *Chauter* v. *Glubb*, 4 Mann. & R. 334; *S. C.* 9 B. & C. 479; *Rex* v. *Lacy*, 8 Dowl. & R. 457; *S. C.* 5 B. & C. 702.

empted from church rates (*d*). The payment of a rate not exceeding 10*l.* due from one individual may be enforced by distress by magistrates (*e*). In other cases, the ecclesiastical court exercises jurisdiction.

Greenwich Hospital was founded in 1694, and was part of an ancient demesne, to which an unconsecrated chapel, chaplains, and a burial ground are attached; but the officers of which occasionally bury, christen, marry, have pews at and resort to, the parish church, and vote at the vestry. It has been decided that the governor is liable to be assessed to the church rate for premises in his beneficial occupation as governor, although the premises had never been so rated before, but no valid ground of exemption was shown to found a prescription (*f*). But the inhabitants of that hospital, consisting of disabled seamen, the objects of that charity, inmates only because they are incapable of maintaining themselves, are not liable to be rated to the church rate, upon the same principle as they are exempt from the poor rate (*g*).

The statute 48 Geo. III. c. 55, granting the assessed taxes, contains the following exemptions from the window tax.

Any hospital, charity school, or house provided for the reception and relief of poor persons, except such apartments therein as are or may be occupied by the officers or servants thereof, which shall be severally assessed, and be subject to the said duties, as entire dwelling houses.

The windows in any room of a dwelling house, licensed according to law as a chapel for the purposes of Divine worship, and used for no other purpose whatsoever.

Every such hospital, charity school, house for the reception and relief of poor persons, or room licensed as a chapel

(*d*) See 1 Burn's Eccl. Law, 378—388; Prideaux on Churchwardens by Tyrw. 86—108, 8th ed. *Miller* v. *Bloomfield*, 1 Addams, 499. The bill introduced in the House of Lords (Feb. 1836) for altering the jurisdiction of ecclesiastical courts, contains provisions for transferring the jurisdiction as to church rates to justices of the peace.

(*e*) 53 Geo. III. c. 127.

(*f*) *Smith and Moze* v. *Keats*, 4 Hagg. 275.

(*g*) *S. C.* Ibid. 282.

as aforesaid, are directed to be charged by the assessors, or stated on the certificate of assessments as such, and on proof of the ground of exemption, may be discharged by the commissioners (*h*).

Charity schools, hospitals, and houses for the reception or relief of poor persons, were also exempted from the inhabited house duty (*i*), which has been repealed (*j*).

SECTION IV.

Of the Provisions respecting Charities in the Statutes relating to the Land Tax.

THE annual land tax acts, from the 4 Will. & Mary, c. 1, invariably contained an exemption in favour of any college or hall in either of the two universities of *Oxford* or *Cambridge*, or the colleges of *Windsor*, *Eton*, *Winton*, *Westminster*, or *Bromley*, or any hospital, in respect of the sites of the said colleges, &c., or any of the buildings within the walls or limits thereof; or any master, fellow, or scholar, or exhibitioner of any such college or hall, or any masters or ushers of any school, in respect of any stipend, wages, rents, profits, or exhibitions whatsoever, arising or growing due to them in respect of the said places or employments in the said universities, colleges, or schools; and also any houses, which, on or before March 25, 1693, did belong to the sites of any college or hall, or to *Christ's Hospital*, *St. Bartholomew's*, *Bridewell*, *St. Thomas's*, and *Bethlem*, or any other hospitals, or almshouses, in respect of any rents or revenues, which before that time were payable to them, being to be received and disbursed for the immediate use and relief of the poor of the said hospitals and almshouses only. Provided that it should not discharge any tenant of any of the houses or lands belonging to the said colleges, halls, or schools, who, by their leases or other contracts were obliged to pay all rates, taxes, and impositions, but that they should be rated and pay

(*h*) 48 Geo. III. c. 55. Sched. (A).
(*i*) Ibid. Sched. (B).
(*j*) 4 & 5 Will. IV. c. 19.

the same. Provided also, that all such lands, revenues, and rents, *settled to any charitable* or pious use, as were assessed in the 4th year of William and Mary (*k*), should be liable to be charged; and that no other lands, tenements, hereditaments, revenues, or rents whatsoever then settled to any charitable or pious uses as aforesaid, should be charged (*l*).

By stat. 38 Geo. III. c. 60, the land tax was made perpetual, but subject to redemption under certain rules and conditions. The consideration for redemption shall, generally speaking, be so much capital stock of the three per centum consolidated annuities, or reduced annuities, as will yield a dividend exceeding the amount of the land tax redeemed by one-tenth part thereof. This stock may be transferred by the purchaser at once, or by instalments; and, in certain cases, the redemption may be made by payments in money.

This act was afterwards amended, and the provisions were consolidated, by 42 Geo. III. c. 116; and further amendments have been since made (*m*).

In *Harrison* v. *Bulcock* (*n*), on the question, whether a clause in the land tax act then in force, exempting hospitals and "any of the buildings within the walls or limits of such hospital," extended to buildings newly added to an hospital on land not forming part of its original site, and which had previously paid land tax; it was held that such buildings were exempted.

Buildings of a college in one of the universities, taken into and made part of the college between the passing of the first land tax act and the act which made that tax perpetual,

(*k*) 38 Geo. III. c. 5, ss. 25, 26, 29.

(*l*) This question is to be settled by the commissioners, 1 H. Bl. 72.

(*m*) 53 Geo. III. c. 142; 57 Geo. III. c. 100; 1 & 2 Will. IV. c. 21, as to double assessments. New commissioners were appointed by 7 & 8 Geo. IV. c. 75; 9 Geo. IV. c. 38; 2 & 3 Will. IV. c. 127; 3 & 4 Will. IV. c. 95. See Tyrw. & Tynd. Dig. of Statutes, 442—475, Suppl. 135—137; 4 & 5 Will. IV. c. 60; 5 & 6 Will. IV. c. 20. On the construction of the land tax redemption and sale acts, see *Williams* v. *Steward*, 3 Mer. 472. On contracts between landlord and tenant as to payment of taxes, see Woodfall by Harrison, 349—353, 2nd ed.

(*n*) 1 H. Bl. 68; cited 3 B. & Adol. 170.

are exempted from the land tax. But where a college soon after the passing of the first land tax act, purchased land of a parish under a private act of parliament, which provided that the college should pay all taxes which the premises then were, or should thereafter be, subject to; it was held that the lands purchased were not exempted from the land tax (*o*).

All bodies politic and corporate, notwithstanding any statutes of mortmain or other acts of parliament, and all feoffees and trustees for charitable and other public purposes, having any estate or interest in any manors, lands, or hereditaments subject to the land tax, may contract for the redemption of the whole or part thereof (*p*).

For the purpose of redeeming any land tax charged on any hereditaments belonging to any bodies politic, or companies, or any feoffees or trustees for charitable or other public purposes, such lands may be sold or mortgaged, or rent-charges granted thereout, and copyholds may be enfranchised (*q*).

The governors of the charity for the relief of the poor widows and children of clergymen, with the consent and under the direction of the commissioners, may sell any manors, lands, &c. given to them by will, either generally for the relief of such widows or children, or subject to any qualifications or restrictions as to the mode of applying such relief, in extent of the allowance to be made to individuals, and apply the proceeds to redeem the land tax charged on any other manors, lands, &c. vested in them for the purposes of such charity (*r*). Personal property in the funds or on mortgage, in the names of corporations or trustees for charitable or other public purposes, and liable to be invested in the purchase of lands in trust for such corporations, &c. may, with the consent of the commissioners under the great seal, or of the court having the control of the funds, be

(*o*) *All Souls' College* v. *Costar*, 3 Bos. & Pull. 635. See *Downing College, Cambridge*, v. *Purchas*, 3 B. & Adol. 162, as to the liability of that college to the payment of rates as part of the university under acts of parliament passed before the foundation of that college.

(*p*) 42 Geo. III. c. 116, s. 9.

(*q*) Id. ss. 69, 70.

(*r*) Id. s. 77.

applied in the redemption of land tax charged on the manors, &c. belonging to such corporations or trustees (*s*).

Where any lands, tenements, or hereditaments had been or should be settled to charitable uses, for the benefit of any parish or place, the land tax may be redeemed out of the poor or church rates, with the approbation of two justices (*t*). Where under any act of parliament, or any deed or will, or under any decree of any court, any trust property shall be applicable to any charitable purposes for the benefit of any parish or place, such trust property may be applied in the redemption of the land tax charged upon any hereditaments settled to charitable uses, for the benefit of such parish, and such property may, with the consent of two justices, be charged with an annuity equal to the amount of the income of the trust property so applied (*u*). The governors and directors of hospitals and other charitable institutions, may apply any legacies or voluntary donations given to or for the benefit of such hospitals or charitable institutions, which shall not have been directed by the donor to be applied in any particular manner, towards the redemption of the land tax charged upon any hereditaments belonging to such hospitals or charitable institutions (*v*).

The provision authorising any persons to give money for the redemption of the land tax charged on lands belonging to charities, has been already stated (*w*).

In order to provide for the purchase of land tax under the powers of 42 Geo. III. c. 116, by any bodies politic, &c., or companies, or any feoffees or trustees for charitable or other public purposes, such bodies, &c. may sell any lands, &c. belonging to them, or mortgage the same, or grant a rent-charge out of the same, or enfranchise any messuages, lands, &c. holden by copy of court roll, or otherwise, of any manor belonging to them, and may dispose of any heriots, or fee-farm, chief, or quit rents, or other advantages issuing out of any freehold, copyhold, or customary manors, or other heredi-

(*s*) 42 Geo. III. c. 116, s. 41.
(*t*) Id. s. 46.
(*u*) Id. s. 47.
(*v*) Id. s. 48.
(*w*) Id. s. 50; *ante*, p. 241.

taments in the same manner, and under the same regulations as such bodies, &c., may do under 42 Geo. III. c. 116, for the like purpose (*x*).

Any ecclesiastical or lay corporations, and feoffees, trustees for charitable or other public purposes, and all other persons entitled to the patronage of any living, may contract for the redemption of the land tax charged on the glebe lands, tithes, or other hereditaments belonging to such living, in consideration only of so much capital stock in the three per cents. as will yield an annuity equal in amount to the land tax to be redeemed (*y*). And in order to provide for any such redemption, any ecclesiastical or lay corporations, or trustees for charitable or other public purposes, under the authority of the commissioners under the great seal, may sell any hereditaments belonging to such corporations or trustees, in the same manner as the land tax acts directed; or may apply for the like purpose any personal property invested in the public stocks, or any legacies or voluntary donations, or other trust money, which they are authorised by land tax acts to lay out in the redemption of land tax; or any surplus stock or money arisen or to arise, by sale, mortgage, or grant, under the powers in such acts (*z*).

Such corporations or trustees for charitable or other public purposes, who shall be desirous of redeeming any land tax charged on any living in their patronage, may declare, in the redemption contracts, that they are desirous that the lands shall not be subject to any annual rent, or other charge in favour of such corporations or trustees in respect of such redemption; but if no such declaration shall be contained in such redemption contracts, such corporations or trustees redeeming such land tax, shall be entitled to an annual rent charge, issuing out of such living, equivalent to the amount of the land tax redeemed, and to like power, on presenting any clerk to such living, of suspending payment of such rent charge during the incumbency of such clerk, as are given by such acts (*a*).

(*x*) 53 Geo. III. c. 123, s. 31.
(*y*) Stat. 57 Geo. III. c. 100, s. 12.
(*z*) Id. s. 13.
(*a*) Id. s. 14.

And when any lands or other such hereditaments are proposed to be sold by any ecclesiastical or lay corporation, or feoffees, or trustees for charitable or other public purposes, for the purpose of redeeming any land tax under the power contained in the 14th section of that act, such corporation, &c. shall present a memorial to the commissioners under the great seal, stating their intention of making such sale, and the object thereof, for their approbation, two of whom, if they so approve, shall certify accordingly (*b*).

The land tax charged upon hereditaments belonging to ecclesiastical benefices and charitable institutions, where the whole clear annual income did not exceed 150*l.*, has, in many cases, been exonerated and discharged, without the transfer or payment of any consideration, by the commmisioners appointed under the great seal, under the powers contained in several acts of parliament (*c*).

In all cases where any tithes, or other hereditaments, have been sold by any body politic or corporate, or company, or any feoffees, or trustees for charitable or other public purposes, the sales and conveyances thereof shall be valid, and the tithes, &c. therein comprised discharged of land tax, notwithstanding that the tithes, &c. so sold were not rated to land tax, or the land tax thereon has not been previously redeemed or purchased; and all such tithes, &c. belonging to any livings comprised in any contract for redemption of the land tax charged on the messuages, lands, &c., belonging to any such living, as at the time of the contract for redemption were not so rated, shall nevertheless be discharged from land tax; and further, all such messuages, lands, &c. belonging to the several livings, or other such benefices or institutions which have been intended to be exonerated from land tax under 46 Geo. III. c. 133, 49 Geo. III. c. 67, and 50 Geo. III. c. 58, shall be exonerated, notwithstanding certain parts of the tithes, &c. belonging to such livings, benefices,or institutions, were not included in the assessment to the land tax (*d*).

(*b*) 57 Geo. III. c. 100, s. 15.

(*c*) 46 Geo. III. c. 133; 49 Geo. III. c. 67; 50 Geo. III. c. 58; 53 Geo. III. c. 123; 57 Geo. III. c. 100, s. 1.

(*d*) 53 Geo. III. c. 123, s. 38.

Where any tenant or lessee, at a rack rent for any term of years, or at will, of any lands, tithes, or other hereditaments, belonging to any ecclesiastical benefices or charitable institutions, exonerated from the land tax, under the provisions of the acts therein mentioned (*e*), shall be bound by agreement to pay the land tax, the amount shall be considered as rent reserved, and be payable on the same days, and the same powers used for the recovery thereof as in case of rent in arrear (*f*).

(*e*) 46 Geo. III. c. 133; 49 Geo. III. c. 67; 50 Geo. III. c. 58; 53 Geo. III. c. 123.

(*f*) 57 Geo. III. c. 100, s. 9.

CHAPTER IX.

OF THE RIGHT OF VOTING FOR MEMBERS OF PARLIAMENT IN RESPECT OF CHARITIES, AND HOW FAR THE RECEIPT OF ALMS OR CHARITY IS A DISQUALIFICATION.

1. *Of Schoolmasters' Right of Voting*, p. 798.
2. *Dissenting Ministers generally disqualified to Vote*, p. 800.
3. *When the Receipt of Alms or Charity is or is not a disqualification*, p. 802.
4. *Receipt of Alms or Charity a Disqualification under the Act for regulating Municipal Corporations*, p. 806.

An office is a right to exercise a public or private employment, and to take the fees and emoluments belonging to it; and all offices relating to land, or exerciseable within a particular district, are deemed incorporeal hereditaments, and classed under the head of real property (*a*). If a house or land belong to an office by the grant of the office by *deed*, the house or land will pass as belonging to it (*b*).

If an office be granted to a person *quamdiu se bene gesserit*, the grantee has an estate for life. For as nothing but misconduct can determine his interest, no one can prefix a shorter time than his life, since it must be by his own act, which the law will not presume, that his estate can determine. If the words be *quamdiu se bene gesserit tantum*, the estate will not be abridged by the addition of the word *tantum* (*c*). So, on the other hand, where an office is granted for life, there is an implied condition in law that

(*a*) 3 Cruise's Dig. tit. Office, pl. 1.
(*b*) Ibid. pl. 15; Co. Litt. 49 a.
(*c*) Co. Litt. 42 a; 1 Roll. Abr. 844; *Harcourt* v. *Fox*, 1 Show. 491.

the party will discharge the duty of the office on pain of forfeiture (*d*).

Offices may also be granted at will (*e*). If the king grants an office to hold at will, and grants a rent to the officer for life for the exercise of the office, an estate for life in the rent is not conferred, because it is granted in respect of discharging the duties of the office, and the rent ceases whenever the grantee's interest in the office determines (*f*).

Offices, in respect of which the holder is possessed of a freehold interest in lands or profits issuing out of or charged upon lands of the annual value of 40*s*., confer a right of voting for county members. It is a general rule that a person not having a freehold interest in house or land, in right of his office, has not a right to vote in respect of it (*g*).

1. *Of schoolmasters' right of voting.*] Schoolmasters, who by virtue of their office enjoy any freehold lands, or rent-charges issuing out of such lands, either for life as sole corporations, or *quamdiu se bene gesserint*, have a right to vote at elections. This right depends upon the interest which they have in their office, and the nature of their interest must be the subject of inquiry in each particular case (*h*). The terms of the foundation and the nature of the appointment must be the subject of consideration (*i*).

By a deed, dated in 1740, an estate was settled on the rector of the parish of *Ampthill* for the time being, on condition that he should "apply out of the rents 5*l*. a-year to one or more schoolmasters or schoolmistresses," for educating sixteen children. A vote in respect of such rent-charge, by the schoolmaster appointed by the rector, was held good. The rector, who was called as a witness as to

(*d*) Litt. s. 378; Co. Litt. 233 b; 4 Inst. 117; *Bartlett* v. *Downes*, 5 Dowl. & R. 526; *S. C.* 3 B. & Cres. 619; 1 Carr. & P. 522.

(*e*) *Reynel's* case, 9 Rep. 97 a.

(*f*) Co. Litt. 42 a.

(*g*) 2 Peck. 93. By stat. 2 & 3 Will. IV. c. 45, ss. 19, 20, the right of voting in counties is now extended to copyholders of the clear annual value of 10*l*., and to leaseholders and occupiers of premises of certain value above charges.

(*h*) Heywood on County Elections, 126, 2d ed.; Male, 273; Orme, 149, 150.

(*i*) See *ante*, pp. 365, 366, 383, 725—735.

the nature of the appointment, stated, that he did not know that he was empowered to turn out a schoolmaster who had been once appointed to the place, and knew no instance in which any one had been displaced (*j*).

The votes of two schoolmasters in respect of land and tithes in their occupation, were held good; one of them was master of the free school of *Biggleswade*, and the other of *Holme*, instituted by the will of Sir *John Cotton* in 1726, under appointments by which they received annual salaries out of an estate settled by the will for those uses. The estate was assessed under the name of *charity land*. The appointment was in the lord of the manor, who thought that he had not power by the institution to remove the masters whom he had appointed (*k*).

The actual receipt of a rent-charge given for the benefit of a school, has been held sufficient to give a vote. The vicar of a parish had the appointment of a schoolmaster and of six boys, and the schoolmaster under the appointment received 40*s*. *per annum*, issuing out of lands charged with it, "for the benefit of the school of *Thurleigh*." The 40*s*. was paid annually to the schoolmaster, by the occupier of the lands charged with it. The vote was objected to, because the annuity was not assessed to the land tax nor registered according to the stat. 3 Geo. III. c. 24 (*l*).

But a master who is removable at pleasure is not qualified to vote (*m*). Therefore a vote by a schoolmaster of a parish, in respect of a rent-charge given by will for "the schoolmaster and children from time to time to be put in and placed there by the approbation and good liking of J. P. and his heirs," was held bad (*n*).

The temporary appointment of a person incapable, according to the institution of the school, to hold the situation of a schoolmaster, will not confer a right of voting in respect of a rent-charge. The appointment recited that no person

(*j*) 2 Lud. 431.
(*k*) 2 Lud. 430—501.
(*l*) 2 Lud. 497, 501. See *Rex* v. *Inhabitants of Owersby*, 15 East, 356.
(*m*) See *ante*, pp. 730, 731.
(*n*) 2 Lud. 428.

qualified, according to the will of the founder, had offered himself for the place, and that therefore the master and fellows of *Sidney College, Cambridge*, who had the right of nomination, at the request of the parish, had agreed to appoint the individual (who had voted) till a person properly qualified should offer (*o*).

2. *Dissenting ministers generally disqualified to vote.*] There can be no general rule applicable to all cases of dissenting ministers, each case must be decided according to its own circumstances, the terms of the appointment, or the customs of the particular body by whom the appointment was made. In some dissenting congregations the first call to a minister is for a limited and probationary term; when such term expires, if the minister be approved, he receives a second call or invitation, in general terms, to become the minister of the congregation: in such cases there can be little doubt but that, by analogy to other appointments in general terms, such an appointment is, in law, an appointment for life (*p*). Such ministers, when mere tenants at will to the trustees, can have no right to vote (*q*).

Three cases are reported, where dissenting ministers enjoying either lands or the profits of lands of the requisite value, in virtue of their respective appointments, which were general, were held not to be entitled to vote, although in one case there was *express* evidence that the congregation were understood to have no power of removal. In one case, a dissenting minister of a parish, who had been appointed under the trust providing an annuity of 15*l.* for an individual during his life, and after his death or ceasing to serve the cure, "then in trust to apply the said annuity towards finding and providing another good, learned, and pious divine of the Presbyterian persuasion, to preach and supply the cure of the said parish so long as the said chapel shall be

(*o*) 2 Lud. 429, 430.

(*p*) Rogers on Elections, 117, 3d ed.

(*q*) See *Doe* d. *Jones* v. *Jones*, 10 B. & Cress. 718; *ante*, pp. 763—765, 766, n. (*i*).

tolerated." Under the latter trust the voter had been appointed. Nothing satisfactory could be proved with regard to the practice of dissenting congregations, whether, under a general appointment, a minister was considered as appointed for life, or during the pleasure of the congregation. The committee thought a general appointment insufficient, and disallowed the vote (*q*).

In another case the committee rejected the vote of a minister of the congregation of *Tewkesbury*, in possession of a house left by the will of *Mary Workman* to the minister for the time being of the congregation of dissenters in *Tewkesbury*, the rent thereof to be taken by them, from time to time (*r*).

So where it appeared that some land had been purchased by persons who acted as trustees of a dissenting congregation in 1741, to build a meeting-house for public worship, and a house for the minister. Since that time there had been a regular succession of ministers, appointed by such of the congregation as received the communion of their church. There was no instance of any one of the ministers having been removed after his appointment; but more than one had been rejected, after more than a year's service in the meeting, in a state of trial. Two members of the congregation who were examined, said, they did not understand that the congregation had a power to remove their minister. The vote of a minister who had held the place upwards of twenty years, in right of which, besides voluntary contributions, he enjoyed two houses and an orchard, one of which houses was let for 2*l.* 14*s.* a-year, was held to be bad (*s*).

(*q*) *Gloucestershire* case, 2 Lud. 436; Heywood's County Elections, 130; Wordsworth's Elec. Law, 47.

(*r*) Heywood's County Elections, 131, 132.

(*s*) *Bedfordshire* case, 2 Lud. 432—440. In favour of the vote it was argued that the place in question was held for life, or during pleasure; for there was no circumstance from which an appointment for a limited term could be collected. A power to remove for misconduct is necessarily incident to all offices, even the greatest, and therefore the voter's being liable to that sort of removal, did not at all diminish his right, being subject to that in common with every other man. If, therefore, he held his place and house during

At the *Yorkshire* election (*t*), the votes of Protestant dissenting ministers, who stated that they believed themselves to be elected by their congregations for life (*u*), and could not be removed from the chapels or houses which they held *virtute officii*, were admitted to vote, whilst the votes of others who declared that they understood that they were removable at pleasure, were rejected (*w*).

3. *When the receipt of alms is, or is not, a disqualification.*] By stat. 2 & 3 Will. IV. c. 45, s. 36, it is enacted, that no person shall be entitled to be registered in any year as a voter in the election of a member or members of parliament for any city or borough, who shall within twelve calendar months next previous to the last day of July in such year have received parochial relief or *other alms* (*x*), which by the law of

good behaviour, his interest in them was that of a freehold.

That although the toleration act had not raised dissenting ministers into an establishment like the national church, yet legal rights might be acquired by their function, which is under the protection of the law.

That the principles upon which the Court of King's Bench interferes by mandamus with respect to dissenting ministers, proved that they were considered to hold their places during good behaviour, that is, upon the same terms by which every other office for life is held. *Ante*, pp. 383—385.

That the case could not be distinguished from those determined in favour of schoolmasters whose votes had been allowed, they being considered as having estates for life in their office, except where there had been particular circumstances in the nature of their appointments, from which a discretionary power of removal might be inferred. 2 Lud. 436—439.

(*t*) Where Mr. J. *Bayley* and Serjeant *Heywood* were assessors, Rogers on Elections, 117, 3d ed.

(*u*) See *Rex* v. *Jotham*, 3 T. R. 575; *ante*, p. 385.

(*w*) Heywood on County Elections, 133.

(*x*) The word "alms" is immediately derived from the French, *aumône*, anciently written "*almosnes*," and that again comes from the Greek, Ἐλεημοσύνη, which is defined to be "*omne beneficium, quo calamitosos prosequimur.*" In its primary sense, then, "alms" is a generic term, comprehending every species of relief bestowed upon the poor, thus including all charities; but in this sense it is rarely used in the resolutions of the House of Commons. Heywood on County Elections, 263. See 1 Dougl. Elec. Cas. 370; 2 Id. 107. Dr. Johnson defines alms, "what is given gratuitously in relief of the poor."

parliament now disqualify from voting in the election of members to serve in parliament.

The principle on which the receipt of alms must be supported as a disability of the common law of parliament, is, that the voter who receives them must be presumed to be in so low a state of indigence that he cannot have any independent will of his own, or exercise a sound discretion in giving his vote (*y*).

It was admitted in the *Bristol* case, that freemen living in almshouses should not be polled, and that almsmen are no where entitled to vote (*z*).

In the case of counties, the law will not presume a voter, continuing in possession of his freehold, to be in a state of disqualifying indigence. Therefore parish relief does not disqualify while the voter retains possession of his freehold (*a*).

A person who had received pecuniary relief out of the parochial funds, and another who had medical attendance only at the expense of the parish, whilst they were suffering from cholera, were held to be disqualified. The pecuniary relief was afforded in the same manner and in proportion to the number of their family as the payments of the parish labourers (*b*).

Charity, in the laws of parliament, has been defined to mean any sum of money, or other emolument, arising from certain specific *funds* appropriated to the assistance of persons in mean or poor circumstances; and a distinction may be made between charities which are of such a nature as to imply that the partaker of them is in a state of indigence and abject dependence, and those which afford no such inference, or from which a contrary one may be drawn. With respect to the former, they, like parochial relief, may work a disqualification of those who receive them, by proving their incapacity to exercise a will of their own in the choice of a representative (*c*).

(*y*) Heywood on County Elections, 269.

(*z*) 1 Dougl. Elec. Cas. 277.

(*a*) *Bedfordshire* case, 2 Lud. 564.

(*b*) Case of *Bedford Town*, 1 Perry & Kn. 130, 132; C. & R. 79, 80, 84. See Orme, 107, 108.

(*c*) Heywood on County Elec-

It was decided, that persons receiving *Harpur's* charity were not disqualified from voting for members of parliament for *Bedford*. In this case, by an act of parliament, the surplus of the rents of certain estates were to be distributed in *alms* to the poor of the said town, for the relief and support of poor decayed housekeepers, and other proper objects. It appeared that about three-fourths of those who received the charity at the last distribution paid parish taxes; that it had always been given to the *middling sort of people*, without solicitation on their part; and that it had always been considered in *Bedford* as a sort of donation, and distinguished from parish pay; and although those receiving parish pay had never been allowed to vote, all the witnesses stated, that until the last election no objection had ever been made to those partaking of *Harpur's* charity (*d*).

Since the last case, it appears that almshouses have been built out of the funds of the charity, which are allotted as dwelling-houses, according to the terms of the original foundation, to "poor decayed householders." The occupiers of these houses pay neither rates nor taxes, which are not charged on the houses; they receive 15*s*. a-week pension, and 3*l*. a-year for clothing; are provided with medical attendance when sick, at the expense of the charity; and are removable at the discretion of the trustees by whom the funds of the charity are administered. It was also stated, that the occupiers possess, in certain cases, a small independence of their own, in addition to what they received from the charity. The vote of a person who lived in one of the almshouses, and

tions, 278; Orme, 167.

In *Rex* v. *Munday*, 1 East, 596, *ante*, p. 787, it was contended, that beneficial occupiers of charity property did not come within the stat. 43 Eliz. c. 2, because the object of that act was the levying a rate for the relief of poor and impotent persons, and consequently that it could not be intended to levy a rate upon such. But *Lawrence*, J. observed, "However the persons rated might have been poor and impotent at the time when they were selected as objects of the charity, yet after their appointment to be members of the foundation, they ceased to be of that description of persons, and therefore became rateable in proportion to the property so acquired."

(*d*) Case of *Bedford Town*, 2 Dougl. Elec. Cas. 95—110.

claimed as an inhabitant householder (*e*), was held good, notwithstanding an objection which was taken on account of his receiving the benefit of *Harpur's* charity (*f*).

So, the receipt of some bread purchased with the rents of lands left for the use of the poor of two parishes in *Bedford*, to be distributed yearly in bread to the poor of those parishes in certain proportions, which bread was given chiefly to wives and children, was held not to disqualify; for it would be unjust to deprive a man of his franchise, because his wife or child had, without his knowledge, received some bread from the charity (*g*).

So money received by the brethren of an hospital was held not to disqualify. In this case the corporation consists of a rector and brethren, who were parties to all leases made of their land, and each of whom had, since an order in council in 1606, received nine-pence per week from the revenues of their land; for the brethren were a corporation, and had a permanent interest in what they received from the profits of their estate, like fellows of colleges, or Chelsea and Greenwich pensioners, who are entitled to vote (*h*).

It was resolved by a committee, that freemen of *Sudbury*, who received donations under the following charities, were not thereby disqualified from voting for members in parliament. One gift was by will of an annuity to trustees to buy materials for shirts and shifts, to be made up and delivered to the ministers, churchwardens and overseers of the poor, to be by them given to twenty-five poor men and twenty-five poor women. In the other case, an annuity was given in like manner to purchase 100 loaves, one of which was to be given to each person who had received a shirt or a shift under the above bequest. In *Sudbury* the overseers have nothing to do with parish pay, the paupers there being under the government of a workhouse corporation established by law before the stat. 43 Eliz. c. 2 (*i*).

(*e*) 2 & 3 Will. IV. c. 45, s. 27.

(*f*) Case of *Bedford Town*, 1 Perry & Kn. 133—135.

(*g*) *Hawes's Charity*, 2 Dougl. Elec. Cas. 113—123.

(*h*) *St. John's Hospital*, Ibid. 114. See 1 Id. 371.

(*i*) *Sudbury* case, Phillips, 148—169; Wordsworth's Dig. Elec. Rep. 12.

The partakers of a charity, which was never given by the trustees to those who received parish relief, but only to those in need of temporary assistance, were held not to be disqualified. The gift was of lands to seven feoffees, to distribute the rents yearly among such poor craftsmen and labourers as should be surcharged by children within the said parish, and for their relief, as should seem best to the feoffees, with the consent of the vicar or curate, and not "to go or be employed to the increase of the church-box of the said parish." It was also directed by another rule, "that such provision should not be accounted any abatement of the collection for the church-box, or any other relief of the poor usually provided for the poor of the parish" (*i*).

So a person was held not to be disqualified by receiving within twelve months before the election, part of a sum given by will to the poor of the parish of I. *who are not on the parish books*, and received no monthly pay (*j*).

A testator, by his will, dated June, 1689, directed the sum of 100*l.* to be laid out in freehold land, the yearly profits whereof were given to the poor of the parish of *St. Mary's-in-the-Wall, Colchester*, to be distributed at the discretion of the parish officers, on Christmas-day, annually; who accordingly did distribute the yearly rent, which amounted to 12*l.*, in sums from 1*s.* 6*d.* to 5*s.* respectively, according to the size of the families of the applicants. It was held that the persons who had received the benefit of the charity were not thereby disqualified (*k*).

The receipt of sacrament money was held not to disqualify (*l*).

But persons were held to be disqualified by receiving the benefit of a charity, by which a piece of land, in 1716, was left to the minister and overseers of the poor of *St. John's* parish, in *Bedford*, then of the value of 4*l.* 10*s.* *per annum*, to be distributed *to the poor* on new year's day. The prac-

(*i*) *Downton* case, 1 Lud. 194—199.

(*j*) *Gloucestershire* case, Orme, 121.

(*k*) *Colchester* case, 1 Peck. 510.

(*l*) Heywood on County Elections, 290.

tice had been to distribute the rents in sums of three or four shillings to each person (*m*).

4. *Receipt of alms or charity a disqualification under the act for regulating municipal corporations.*] By the municipal reform act, 5 & 6 Will. IV. c. 76, s. 9, occupiers of houses and shops, who, on the last day of August in any year, and the two preceding years, shall have been rated to the relief of the poor, are entitled to be burgesses, if resident householders within seven miles; but no person is to be enrolled, in any year, who, within twelve calendar months before the 1st August, shall have received parochial relief, or other alms, or any pension or charitable allowance, from any fund intrusted to the charitable trustees of such borough (*n*). The 10th section provides, that no medical or surgical assistance given by the charitable trustees of any borough, shall be taken to be such charitable allowance as shall disqualify any person from being enrolled as a burgess; nor shall any person be so disqualified, by reason that any child of such person shall have been admitted and taught within any public or endowed school.

(*m*) *Welborn's Charity; Bedford* case, 2 Dougl. Elec. Cas. 113.

(*n*) By the 68th section of the above act, all pensions and allowances granted on or before the 5th of June, 1835, by the corporate body named in the schedules (A) and (B), in conjunction with any borough, to any retired officer or servant, or to the widow or child of any officer or servant, and all stipends and allowances, which, during seven years next before the said 5th day of June had been usually paid and granted to the minister or late minister of any church or chapel, or to the master or usher of any school, or to the governor or master of any hospital within such borough, and all charitable allowances which had been usually paid as aforesaid to the inmates of any almshouses by such corporate body, are directed to be secured at the expense of the borough fund, as soon as conveniently might be after the passing of that act, to every person entitled or accustomed to have and receive the same, by bond or obligation, under the common seal of the borough, out of whose funds the same shall be payable in a sufficient penalty conditioned for the payment to such person, his executors or administrators, of such pension, stipend, or allowance, with all arrears thereof, if any, accrued due before the date of such bond.

APPENDIX.

PART I.

THE STATUTES RELATING TO MORTMAIN AND CHARITABLE USES.

MAGNA CHARTA, 9 HENRY III. c. 36, A. D. 1224-5.

No Land shall be given in Mortmain.

9 H. III. c. 36.

IT shall not be lawful from henceforth to any to give his lands to any religious house, and to take the same land again to hold of the same house. Nor shall it be lawful to any house of religion to take the lands of any, and to lease the same to him of whom he received it. If any from henceforth give his lands to any religious house and thereupon be convict, the gift shall be utterly void, and the land shall accrue to the lord of the fee (*a*).

THE STATUTE DE RELIGIOSIS, 7 EDWARD I. stat. 2, c. 1, 15th Nov. A. D. 1279.

Who shall take the forfeiture of Lands given in Mortmain.

7 Edw. I. st. 2, c. 1.

THE king to the justices of his bench greeting, where of late it was provided, that religious men should not enter into the fees of any without licence and will of the chief lord of whom such fees be holden immediately; and notwithstanding such religious men have entered as well into their own fees as into the fees of other men, approprying and buying them, and sometime receiving them of the gift of others, whereby the services that are due of such fees, and which at the beginning were provided for defence of the realm, are wrongfully withdrawn, and the chief lords do leese their eschetes of the same: We, therefore, to the profit of our realm intending to provide convenient remedy, by the advice

(*a*) *Ante*, pp. 5, 6.

7 Ed. I. st. 2. c. 1.

of our prelates, earls and other liege men of our kingdom being of our council, have provided, made and ordained, that

No land shall be aliened in Mortmain upon pain of the forfeiture thereof.

no person religious or other whatsoever he be, that will buy or sell any lands or tenements, or under the colour of gift or lease, or that will receive by reason of any other title whatsoever it be, lands or tenements, or by any other craft or engine will presume to appropre to himself under pain of forfeiture of the same, whereby such lands or tenements may any wise come into mortmain. We have provided also, that

Who shall receive the benefit of the forfeiture.

if any person religious or other, do presume either by craft or engine to offend against this statute, it shall be lawful to us and other chief lords of the fee immediate, to enter into the land so aliened within a year from the time of the alienation, and to hold it in fee as an inheritance. And if the chief lord immediate be negligent, and will not enter into such fee within the year, then it shall be lawful to the next chief lord immediate of the same fee to enter into the same land within half a year next following, and to hold it as before is said; and so every lord immediate may enter into such land, if the next lord be negligent in entering into the same fee as is aforesaid. And if all the chief lords of such fees, being of full age within the four seas and out of prison, be negligent or slack in this behalf for one whole year, we, immediately after the year accomplished from the time that such purchases, gifts or appropriations hap to be made, shall take such lands and tenements into our hand, and shall infeoff other therein by certain services to be done to us for the defence of our realm; saving to the chief lords of the same fees their wards and eschetes, and other services thereunto due and accustomed. And therefore we command you, that ye cause the foresaid statute to be read before you, and from henceforth to be kept firmly and observed. Witness myself at *Westminster*, the fifteenth day of *November*, the seventh year of our reign (*b*).

Statute of Westminster the Second, 13 Edward I. st. 1, c. 32, A. D. 1285.

Remedy in Case of Mortmain by Recovery of Land by Default.

13 Ed. I. st. 1, c. 32. 7 Ed. I. st. 2. 2 Inst. 428.

When religious men and other ecclesiastical persons do implead any, and the party impleaded maketh default, whereby he ought to leese the land, forasmuch as the justices have thought hitherto, that if the party impleaded make default by collusion, that where the demandant, by occasion of the statute, could not obtain seisin of the land by title of gift or other alienation, he shall now, by reason of the default,

(*b*) *Ante*, pp. 6—12.

and so the statute is defrauded; it is ordained by our lord the king, and granted, that in this case after the default made, it shall be inquired by the country whether the demandant had right in the thing demanded or no. And if it be found that the demandant had right in his demand, the judgment shall pass with him, and he shall recover seisin; and if he hath no right, the land shall accrue to the next lord of the fee, if he demand it within a year from the time of the inquest taken; and if he do not demand it within the year, it shall accrue to the next lord above, if he do demand it within half a year after the same year; and so every lord after the next lord shall have the space of half a year to demand it successively, until it come to the king, to whom at length through default of other lords the land shall accrue. And to challenge the jurors of the inquest, every of the chief lords of the fees shall be admitted, and likewise for the king they that will shall challenge; and after the judgment given, the land shall remain clear in the king's hands, until it be dereigned by the demandant or some other chief lord, and the sheriff shall be charged to answer therefore at the exchequer (*c*).

13 Ed. I. st. 1, c. 32.

Every chief lord may challenge the jurors.

9 H. III. st. 3, c. 36.

13 Edward I. st. 1, c. 33.

Lands where Crosses be set, shall be forfeited as Lands aliened in Mortmain.

Forasmuch as many tenants set up crosses, or cause to be set up in their lands, in prejudice of their lords, that tenants should defend themselves against the chief lords of the fee by the privileges of templars and hospitalers; it is ordained, that such lands shall be forfeit to the chief lords, or to the king, in the same manner as is provided for lands aliened in *Mortmain* (*d*).

13 Ed. I. st. 1, c. 33. 2 Inst. 431.

34 Edward I. st. 3, A. D. 1306.

That Lands shall not be aliened in Mortmain, where there be Mesnes, without their consent.

Touching the king's grant to be made upon inquests returned into the Chancery for lands to be aliened into *Mortmain*, the king commandeth that nothing shall be done (where there be any lords mean) except the religious persons can show to our lord the king their assent under their patents sealed with their seals; and that nothing shall pass in case where the donor reserveth nothing to himself. And

34 Ed. I. st. 3.

(*c*) *Ante*, p. 13. (*d*) *Ante*, pp. 14, 15.

34 Ed. I. st. 3. likewise where inquisitions be made and returned without warrant, that is to wit, the writ original returned with the inquest, and likewise unless the writ original make mention of everything, according to the new ordinance devised by the king (*e*).

18 Edward III. st. 3, c. 3, A. D. 1344.

Prelates impeached for Purchasing Lands in Mortmain.

18 Ed. III. st. 3, c. 3. Item, if prelates, clerks beneficed, or religious people, which have purchased lands, and the same have put to mortmain, be impeached upon the same before our justices, and they show our charter of licence and process thereupon made by an inquest of *Ad quod damnum*, or of our grace or by fine, they shall be freely let in peace, without being further impeached for the same purchase. And in case they cannot sufficiently show that they have entered by due process after licence to them granted in general or in special, that they shall be well received to make a convenient fine for the same; and that the enquiry of this article shall wholly cease according to the accord comprised in this parliament (*f*).

15 Richard II. c. 5, A. D. 1391.

For explaining and amending the Statute of Mortmain, 7 Ed. I. st. 2.

15 Rich. II. c. 5. Item, whereas it is contained in the statute *De Religiosis*, that no religious nor other whatsoever he be, do buy or sell or under colour of gift or term, or any other manner of title whatsoever, receive of any man, or in any manner by gift or engine cause to be appropriated unto him any lands or tenements upon pain of forfeiture of the same, whereby the said lands and tenements in any manner might come to *Mortmain*. And if any religious, or any other, do against the said statute by art or engine in any manner, that it be lawful to the king and to other lords upon the said lands and tenements to enter, as in the said statute doth more fully appear. And now of late by subtile imagination and by art and engine, some religious persons, parsons, vicars, and other spiritual persons, have entered in divers lands and tenements which be adjoining to their churches, and of the same by sufferance and assent of the tenants, have made church-yards, and by bulls of the bishop of *Rome* have dedicated and hallowed the same, and in them do make continually parochial burying, without licence of the king and of

It is within the compass of the statute of mortmain to convert any land to a church-yard

(*e*) See *ante*, p. 36; 7 & 8 Will. III. c. 37; *ante*, pp. 39, 40.
(*f*) *Ante*, p. 36.

the chief lords: therefore it is declared in this parliament, that it is manifestly within the compass of the said statute. And moreover it is agreed and assented, that all they that be possessed by feoffment, or by other manner to the use of religious people or other spiritual persons, of lands and tenements, fees, advowsons, or any manner other possessions whatsoever, to amortise them, and whereof the said religious and spiritual persons take the profits, that betwixt this and the feast of St. *Michael* next coming, they shall cause them to be amortised by the licence of the king and of the lords, or else that they shall sell and aliene them to some other use between this and the said feast, upon pain to be forfeited to the king and to the lords, according to the form of the said statute of religious, as lands purchased by religious people: and that from henceforth no such purchase be made, so that such religious or other spiritual persons take thereof, the profits as afore is said, upon pain aforesaid. And that the same statute extend and be observed of all lands, tenements, fees, advowsons and other possessions purchased or to be purchased to the use of gilds or fraternities. And moreover it is assented, because mayors, bailiffs and commons of cities, boroughs and other towns which have a perpetual commonalty, and others which have offices perpetual, be as perpetual as people of religion, that from henceforth they shall not purchase to them and to their commons or office, upon pain contained in the said statute *De Religiosis*. And whereas others be possessed or hereafter shall purchase to their use, and they thereof take the profits, it shall be done in like manner as is aforesaid of people of religion (*g*).

15 Rich. II. c. 5.

Mortmain where some be seised of lands to the use of religious or spiritual persons.

Mortmain to purchase lands to gilds, fraternities, offices, commonalties.

Mortmain in respect of taking of lands in use.

23 Henry VIII. c. 10, A. D. 1531-2.

An Act for Feoffments and Assurances of Lands and Tenements made to the use of any Parish Church, Chapel, or such like.

23 H. VIII. c. 10.

Where by reason of feoffments, fines, recoveries, and other estates and assurances made of trust of manors, lands, tenements and hereditaments, to the use of parish churches, chapels, church-wardens, guilds, fraternities, commonalties, companies or brotherheads erected and made of devotion, or by common assent of the people without any corporation, and also by reason of feoffments, fines, recoveries, wills and other acts made to any uses aforesaid, or to the uses and intents to have obites perpetual or a continual service of a priest for ever, or for three score or four score years, founden of the issues and profits of the manors, lands, tenements and

(*g*) *Ante*, pp. 16—18.

23 H. VIII. c. 10.

hereditaments, whereof such feoffments, fines, recoveries, wills and other acts be made, or that the feoffees, conisees, recoverers, or other persons, and their heirs thereof seised, shall take, levy, receive and perceive, or cause or suffer to be taken, levied and perceived, the issues, revenues and profits thereof, and the same to dispose, pay, convert, or otherwise employ or suffer, or cause to be disposed, paid, converted or employed to any such uses, intents or purposes as be above specified, or to any other like uses and intents; there groweth and issueth to the king our sovereign lord, and to other lords and subjects of the realm, the same like losses and inconveniences, and is as much prejudicial to them as doth and is in case where lands be aliened into mortmain:

Assurances of lands to churches, chapels, &c. shall be void.

II. Be it therefore enacted by the king our sovereign lord, the lords spiritual and temporal, and the commons in this present parliament assembled, and by the authority of the same, that all and every such uses, intents and purposes of what name, nature or quality they shall be called, that shall be devised, covenanted, made, declared, or in anywise ordained after the first day of *March*, in the three and twentieth year of the reign of our sovereign lord king Henry the Eighth, by any feoffee, recoverer, or conisee, or by any other person or persons to whose use any such feoffee, recoverer, or conisee shall be seised of any manors, lands, tenements, or hereditaments, or of the issues, revenues and profits of them or any of them, shall be utterly void, and of no strength, virtue, nor effect in the law.

Proviso for assurances of lands to such purposes, &c. for 20 years.

III. Provided alway, that it shall be lawful to every person being seised of any manors, lands, tenements or hereditaments to his own proper use, or having feoffees, recoverers or conisees to his use, to make, ordain, or devise, or cause to be made, ordained, or devised, any of the uses, intents and purposes above specified, in such manner as they might have done before the making of this act, and as if this act had never been made; so that no such uses, intents, or purposes to be so made, ordained, or devised after the said first day of *March*, be not in any wise made, ordained, devised, or appointed to endure, continue, or abide, by any craft, colour, terms, sentences, clauses, words, or other means, above the term of twenty years next after the first making and beginning of any such uses, intents, or purposes (*i*).

Collateral assurances in fraud of the statute shall be void.

IV. And it is further enacted, that if any person or persons in defraud of this statute bind or ordain any their heirs or successors, or any other person or persons, that they shall suffer such uses, intents and purposes to endure and con-

(*i*) *Ante*, p. 19.

tinue, contrary to this act, upon pains or penalties of losses of any other lands, tenements, or hereditaments, or of any other thing or things; or do attempt or devise by any colour, craft or means any thing or things, to make any such uses, intents or purposes, to be declared contrary to the true meaning of this act, to continue or abide for any longer time or season than is above limited for the same; that then every such pain, penalty, craft, colour, and every other thing and things, of what kind, nature, or quality soever it be that shall be so made, ordained, or devised in defraud of this act, shall be utterly void in the law to all intents; and that this statute shall be always interpreted and expounded, as beneficially as may be, to the destruction and utter avoiding of such uses, intents, and purposes therein above remembered, and of all other like uses and intents, otherwise than only after such manner as is afore by this present act provided. 23 H. VIII. c. 10.

V. Provided alway, that in such cities and towns corporate, where by their ancient customs they have good and lawful authorities to devise into mortmain the lands, tenements and hereditaments within the same cities or towns corporate, that this act shall not be in any wise prejudicial or hurtful to any such custom. Customs of cities and towns corporate to devise lands, saved.

The act contains a proviso in favour of devises made by *Roberte Jannis* and *John Terry*, for the relief of the poor of the city of *Norwich*, from tolls, taxes, &c.

Statute of Charitable Uses, 43 Elizabeth, c. 4, A. D. 1601.

An Act to redress the misemployment of Lands, Goods, and Stocks of Money heretofore given to certain Charitable Uses.

Whereas lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money, and stocks of money have been heretofore given, limited, appointed, and assigned, as well by the queen's most excellent majesty and her most noble progenitors, as by sundry other well-disposed persons; some for relief of aged, impotent and poor people; some for maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars in universities; some for repair of bridges, ports, havens, causeways, churches, sea-banks and highways; some for education and preferment of orphans, some for or towards relief, stock or maintenance for houses of correction, some for marriages of poor maids, some for supportation, aid and help of young tradesmen, handicraftsmen and persons decayed, and others 43 Eliz. c. 4.

43 Eliz. c. 4.

for relief or redemption of prisoners or captives, and for aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers and other taxes (*j*); which lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money and stocks of money, nevertheless, have not been employed according to the charitable intent of the givers and founders thereof, by reason of frauds, breaches of trust and negligence in those that should pay, deliver, and employ the same: For redress and remedy whereof, be it enacted by authority of this present parliament, that it shall and may be lawful to and for the lord chancellor or keeper of the great seal of *England* for the time being, and for the chancellor of the duchy of *Lancaster* for the time being for lands within the county palatine of *Lancaster*, from time to time, to award commissions under the great seal of *England* or the seal of the county palatine, as the case shall require, into all or any part or parts of this realm respectively, according to their several jurisdictions as aforesaid, to the bishop of every several diocese and his chancellor, (in case there shall be any bishop of that diocese at the time of awarding of the same commissions,) and to other persons of good and sound behaviour, authorising them thereby, or any four or more of them, to inquire as well by the oaths of twelve lawful men or more of the county (*k*), as by all other good and lawful ways and means, of all and singular such gifts, limitations, assignments and appointments aforesaid, and of the abuses, breaches of trusts, negligences, misemployments, not employing, concealing, defrauding, misconverting or misgovernment of any lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money or stocks of money heretofore given, limited, appointed or assigned, or which hereafter shall be given, limited, appointed, or assigned, to or for any the charitable and godly uses before rehearsed: and after the said commissioners or any four or more of them (upon calling the parties interested in any such lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money and stocks of money) shall make inquiry by the oaths of twelve men or more of the said county (whereunto the said parties interested shall and may have and take their lawful challenge and challenges), and upon such inquiry, hearing and examining thereof, set down such orders, judgments and decrees as the said lands, tene-

Commissioners to inquire of the gift of lands and goods to charitable uses. Four commissioners at the least.

The inquiry.

The commissioners' orders.

(*j*) *Ante*, pp. 58—82.

(*k*) A commission of charitable uses, directed to commissioners to inquire by the jury of a particular borough in a county, was held good, as the chancellor was not obliged to issue such commission for entire counties alone. *Bailiff of Ilchester* v. *Bendishe*, West's Rep. temp. Hardw. 184; *S. C.* 2 Eq. Abr. 200.

ments, rents, annuities, profits, goods, chattels, money, and stocks of money may be duly and faithfully employed to and for such of the charitable uses and intents before rehearsed respectively, for which they were given, limited, assigned, or appointed by the donors and founders thereof: which orders, judgments, and decrees, not being contrary or repugnant to the orders, statutes, or decrees of the donors or founders, shall by the authority of this present parliament stand firm and good, according to the tenor and purport thereof, and shall be executed accordingly, until the same shall be undone or altered by the lord chancellor of *England* or lord keeper of the great seal of *England*, or the chancellor of the county palatine of *Lancaster*, respectively, within their several jurisdictions, upon complaint by any party grieved to be made to them.

The commissioners' orders shall be executed.

The commissioners' orders altered.

II. Provided always, that neither this act nor anything therein contained, shall in anywise extend to any lands, tenements, rents, annuities, profits, goods, chattels, money, or stocks of money given, limited, appointed, or assigned, or which shall be given, limited, appointed, or assigned, to any college, hall, or house of learning within the universities of *Oxford* or *Cambridge*, or to the colleges of *Westminster*, *Eaton*, or *Winchester*, or any of them, or to any cathedral or collegiate church within this realm.

Colleges, halls, in Oxford or Cambridge, Westminster, Eaton, Winchester, cathedral churches. 1 Lev. 284.

III. And provided also, that neither this act nor anything therein shall extend to any city, to town corporate, or to any the lands or tenements given to the uses aforesaid, within any such city or town corporate, where there is a special governor or governors appointed to govern or direct such lands, tenements, or things disposed to any the uses aforesaid, neither to any college, hospital, or free school which have special visitors, or governors or overseers appointed them by their founders (*g*).

City, town corporate, college, hospital, free-school.

IV. Provided also, and be it enacted by the authority aforesaid, that neither this act nor anything therein contained, shall be any way prejudicial or hurtful to the jurisdiction or power of the ordinary, but that he may lawfully in every cause execute and perform the same as though this act had never been had or made.

Ordinary's jurisdiction.

V. Provided also, and be it enacted, that no person or persons that hath or shall have any of the said lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money, or stocks of money in his hands or possession, or doth or shall pretend title thereunto, shall be named a commissioner or a juror for any the causes aforesaid, or being named, shall execute or serve in the same.

None shall be commissioner or juror which hath any part of the lands or goods in question

(*g*) *Ante*, p. 292—296.

43 Eliz. c. 4.

Purchasers of the lands *bona fide.*

VI. And provided also, that no person or persons which hath purchased or obtained, or shall purchase or obtain, upon valuable consideration of money or land, any estate or interest of, in, to or out of any lands, tenements, rents, annuities, hereditaments, goods, or chattels, that have been or shall be given, limited, or appointed to any the charitable uses above mentioned, without fraud or covin, having no notice of the same charitable use, shall not be impeached by any decrees or orders of the commissioners above mentioned for or concerning the same his estate or interest (*h*): and yet, nevertheless, be it enacted, that the said commissioners, or any four or more of them, shall and may make decrees and orders for recompence to be made by any person or persons who, being put in trust, or having notice of the charitable uses above-mentioned, hath or shall break the same trust, or defraud the same uses, by any conveyance, gift, grant, lease, demise, release, or conversion whatsoever, and against the heirs, executors and administrators of him, them, or any of them having assets in law or equity, so far as the same assets will extend.

Recompence by those which break the trust.

Land assured to King Henry VIII. Ed. VI. Queen Mary, and Queen Elizabeth.

VII. Provided always, that this act shall not extend to give power or authority to any commissioners before mentioned to make any orders, judgments, or decrees, for or concerning any manors, lands, tenements, or other hereditaments, assured, conveyed, granted, or come unto the queen's majesty, to the late King Henry the Eighth, King Edward the Sixth, or Queen Mary, by act of parliament, surrender, exchange, relinquishment, escheat, attainder, conveyance, or otherwise: and yet, nevertheless, be it enacted, that if any such manors, lands, tenements, or hereditaments, or any of them, or any estate, rent, or profit thereof, or out of the same or any part thereof, have or hath been given, granted, limited, appointed, or assigned to or for any the charitable uses before expressed, at any time sithence the beginning of her majesty's reign; that then the said commissioners, or any four or more of them, shall and may, as concerning the same lands, tenements, hereditaments, estate, rent or profit so given, limited, appointed or assigned, proceed to inquire and to make orders, judgments and decrees, according to the purport and meaning of this act, as before is mentioned; the said last-mentioned proviso notwithstanding.

Certifying of the orders.

VIII. And be it further enacted, that all orders, judgments and decrees of the said commissioners, or of any four or more of them, shall be certified under the seals of the said commissioners, or any four or more of them, either into the court of the chancery of *England*, or into the court of the

(*h*) *Ante*, pp. 296—300.

chancery within the county palatine of *Lancaster*, as the case shall require respectively, according to their several jurisdictions, within such convenient time as shall be limited in the said commissions. 43 Eliz. c. 4.

IX. And that the said lord chancellor or lord keeper, and the said chancellor of the duchy, shall and may, within their said several jurisdictions, take such order for the due execution of all or any of the said judgments, decrees and orders as to either of them shall seem fit and convenient. Order for the execution of the commissioners' decree. Cro. Car. 40.

X. And that if after any such certificate or certificates made, any person or persons shall find themselves grieved with any of the said orders, judgments or decrees, that then it shall and may be lawful to and for them or any of them, to complain in that behalf unto the said lord chancellor or lord keeper, or to the chancellor of the said duchy of *Lancaster*, according to their several jurisdictions, for redress therein: and that upon such complaint, the said lord chancellor or lord keeper, or the said chancellor of the duchy, may, according to their said several jurisdictions, by such course as to their wisdoms shall seem meetest, the circumstances of the case considered, proceed to the examination, hearing, and determining thereof: and upon hearing thereof, shall and may annul, diminish, alter, or enlarge the said orders, judgments and decrees of the said commissioners, or any four or more of them, as to either of them in their said several jurisdictions, shall be thought to stand with equity and good conscience, according to the true intent and meaning of the donors and founders thereof (i); and shall and may tax and award good costs of suit by their discretions against such persons as they shall find to complain unto them, without just and sufficient cause, of the orders, judgments and decrees before mentioned. A remedy for any person grieved by the commissioners' decree. Cost of suit against the complainers.

Money given for Binding out poor Apprentices, 7 James I. c. 3, A. D. 1609.

An Act for the continuing and better Maintenance of Husbandry and other manual Occupations, by the true Employment of Monies given and to be given for the Binding out of Apprentices.

Forasmuch as the true labour and exercise of husbandry, and the bringing up of apprentices of both sexes in trades and manual occupations, are things very profitable in the commonwealth, and acceptable and pleasing unto Almighty God, 7 Jac. c. 3. How money given for the binding of poor chil-

(i) *Ante*, pp. 289—292.

7 Jac. c. 3.

dren to occupations, shall be bestowed.

there being already great sums of money freely given, and more in time to come like to be given by divers well-disposed persons, unto the corporations of divers cities, boroughs, towns corporate, and unto divers persons in sundry towns not corporate, and parishes within this realm of *England*, to be continually employed in the binding out as apprentices, of a great number of the poorest sort of children unto needful trades and occupations; the experience whereof hath brought forth very great profit and commodity unto those cities, towns, and parishes where any parts of the said monies have been so given and employed, and so no doubt there will consequently ensue thereof the exceeding good of the commonwealth in general; and for that the most part of the poorer sorts of children, would (as heretofore) without such good care and assistance, be brought up in idleness and disordered kinds of life, to their utter overthrow, and to the great prejudice of the whole commonwealth; and for that it is very likely that many other well-disposed people will be the better encouraged willingly to follow the like good example, in bestowing also good sums of monies to the same good and godly purposes, if it might be so provided, that such monies as have been already so freely given, or as hereafter shall be given for the binding out of such poor children apprentices, may continually hereafter remain, and be wholly employed accordingly.

How money given for the binding out of apprentices of poor children shall be employed, and by whom.

II. Be it therefore enacted by the king's most excellent majesty, the lords spiritual and temporal, and the commons, in this present parliament assembled, and by the authority of the same, that all sums of money so freely given at any time within three years last past, or hereafter to be given by any person or persons, to be continually employed for the binding out of apprentices, as aforesaid, shall for ever from henceforth continue, and be from time to time used and employed to such uses, intents, and purposes only, and by such persons, and in such manner and form as shall be hereafter by this present act specified and declared, except the same have been, or shall be otherwise ordered or disposed by the givers thereof; that is to say, that all corporations of all cities, boroughs, and towns corporate, by what name or names soever they shall be known or incorporated, and in towns and parishes not incorporate, the parson or vicar of every such town or parish (*k*), together with the constable or constables, the churchwarden or churchwardens, collectors, and the overseers for the poor for the time being, or the most part of them, where any such sum or sums of money are already

(*k*) In the *Attorney General* v. *Lord Newport*, Finch's Rep. 187, it was held that a sum of money given for placing out apprentices, ought to be paid to the parson of the parish, to be invested by him.

7 Jac. c. 3.

given, or shall be hereafter given to be so employed, shall from time to time, within the said several cities, boroughs, towns, and parishes respectively, have the nomination and placing of such apprentices, and the guiding and employment of all such monies as have been heretofore so given, or which hereafter shall be given, to and for the continual binding forth of such and so many apprentices, and in such sort as is already, or shall hereafter be so given and appointed, either by the last will and testament, or by any writing or writings under the hands and seals of any person or persons which hath already, or hereafter shall so give, any sum or sums of monies unto the good and godly purposes and intents aforesaid; and if the corporation of any such cities, boroughs, or towns corporate, by what name or names soever they shall be called or incorporated, or any the person or persons in the other towns and parishes above mentioned, appointed by this act to have continually the guiding and employment of such sums of monies so already given, or hereafter to be given, to the intents and purposes aforesaid, shall at any time hereafter wilfully forbear or refuse, according to their duties in this behalf, to employ such sums of money so given or to be given, as aforesaid, for the binding out of such apprentices, by means of which wilful forbearance or refusing, the said money shall not be employed accordingly, that *then* they and every of them so offending, contrary to this act, shall forfeit, for every such offence, the sum of three pounds six shillings and eight-pence, lawful *English* money; the one half thereof to be given to the poor of the town or parish where such fault or offence shall be done or committed, the other moiety to the party that shall sue for the same; and that every man that will, may, and shall be admitted to sue for the same moiety, for the use and benefit of the said poor, and shall be also admitted to sue for the forfeiture of the other moiety in any of the king's majesty's courts of record, to his own benefit and behoof, by action of debt, bill, plaint, or information, wherein no protection, wager of law, or essoin, shall be admitted or allowed.

The forfeiture of those who of duty ought, and yet refuse, to employ the money.

III. And for that all monies so given may the better continue to and for the purposes aforesaid, be it enacted by the authority aforesaid, that the master, mistress or dame of every such apprentice or apprentices that shall receive any such sum or sums of money as aforesaid, shall become bound with one or two sufficient sureties, by bond or obligation in double the sum which they and every of them shall so receive with such apprentice or apprentices as aforesaid, unto the corporation of any such city or town corporate, by what name or names soever they shall be called or incorporated, or to such person or persons in the other towns and parishes not incorporated, appointed by this act to have continually the

The party which receiveth the money shall be bound with sureties to repay it.

7 Jac. c. 3.

guiding and employment of all such sums of money so already given, or hereafter to be given, to the intents and purposes aforesaid, respectively; upon condition to repay such sum or sums of money, as he or she shall so receive with any such apprentice or apprentices, at the end of seven years next ensuing the date of the said obligation, or within three months next after the end of the said seven years; and if such apprentice shall happen to die within the said space of seven years, then within one year after his or her said death; and if the master, mistress or dame to whom any such apprentice or apprentices shall be bound, shall happen to die within the said space of seven years, then within one year next after his or her said death; so as the said monies may be again employed for placing such apprentice with some other person of the same trade, to serve out the residue of the years of his or her former apprenticeship, by the discretion of the said persons trusted as aforesaid.

Within what time the money shall be put forth.

IV. And be it further enacted by the authority aforesaid, that every such sum or sums of money so given, or to be given, in manner and form, and to and for the good uses and intents aforesaid, shall always be put forth and employed by the parties aforesaid, that by this act shall have the disposing and employment thereof, within three months at the furthest, after such money shall come to the hands of the said parties, that by the intent and true meaning of this act ought to dispose and employ the same; and if at such times there shall not be found fit and apt persons to be bound out apprentices as aforesaid, within the said cities, towns, and parishes where such sums of money are or hereafter shall be given to be employed, as afore is declared; then such of the poorest children of any of the parishes next adjoining shall be bound apprentices in manner as aforesaid, as by the care and good discretions of the parties which by this act have the disposing and employment of the said sums of money in the cities, towns, and parishes where it was first given to be employed, shall be thought fit and convenient, taking such bonds and obligations of the persons that shall receive the said sums of money so put forth, and with such sureties, and upon such conditions, as is above mentioned and declared.

A provision if there be not fit persons in that parish to be apprentices.

What sort of persons shall be apprentices.

V. Provided always, and be it enacted by the authority aforesaid, that choice from time to time be made of the poorest sorts of children of every such city, town, and parish, where such monies shall be so given, and whose parents are least able to relieve them; and that no such apprentice shall be above the age of fifteen years when he or she shall be so first bound out an apprentice.

Account shall be made of the money employed.

VI. And for the better execution of this act, be it further enacted by the authority aforesaid, that all and every person and persons appointed by this act to have the employing and

disposing of any sum or sums of money so given or to be given, as aforesaid, within any town or parish not corporate, shall after the end of this present session of parliament, once every year in the *Easter* week, or within one month next after *Easter* day, make a true and perfect account before four, three, or two justices of the peace dwelling in or next to every of the said towns or parishes, of all such sum and sums of money as they or any of them have employed in binding of apprentices, by virtue of this act, and of all bonds and obligations taken for the payment thereof; and also of all such sums of money as then shall happen to be remaining in their hands not employed; and also shall at the making and yielding up of the said account, or within ten days then next following, yield and deliver up unto such as shall happen next to succeed them, or then to be in the said rooms and places, all such obligations and bonds as by them or any of them have been before that time taken to the uses aforesaid; as also all sums of money remaining in their or any of their hands, to be employed as aforesaid, and not employed at the time of the yielding up of the said account. 7 Jac. c. 3.

VII. And further, be it enacted by the authority aforesaid, that if any of the parties appointed and trusted by this act to have the disposing and employment of any of the said sums of money so given or to be given as aforesaid, shall in any point or degree break the trust and confidence in them in this behalf reposed, or shall commit any other misdemeanor or offence in misemploying of the said sums of money, or any part thereof, or in doing any other act or acts contrary to their duties, and the true intent and meaning of this act, for which there is not by this act any penalty given or appointed, then it shall and may be lawful for any person or persons whatsoever, in the behalf of the poor of such city, borough, or parish, to exhibit his petition to the lord chancellor or lord keeper of the great seal of *England*, for the time being, touching the same: which lord chancellor, or lord keeper of the great seal of *England*, for the time being, shall thereupon have full power and authority to award a commission out of the high court of chancery, under the great seal of *England*, to such and so many persons as his lordship shall think meet to inquire, hear, and determine the said offences, and every of them: and if the said commissioners, or the most part of them, shall find that any sum or sums of money so given or to be given, are lost, impaired, wasted, or diminished, then they, or the most part of them, shall likewise have power, by virtue of this act and of their said commission, to rate, raise, and collect the said sum of money so lost, impaired, wasted, or diminished, upon such person or persons in places not incorporate, as by this act are appointed to have the guiding A remedy where any party trusted shall break the trust, or commit any offence.

7 Jac. c. 3.

and ordering of the said monies, if they or any of them have failed in their said duties in that behalf, or otherwise upon the able inhabitants of such city, town, or parish where the same shall so happen, as in the discretion of the said commissioners, or the greatest part of them, shall be thought fittest, and to return the said commission, and the manner of the execution thereof, into the said high court of chancery, within three months next after the execution thereof; and if any person or persons shall find himself grieved by any thing done by the said commissioners, then upon complaint *thereof* made in the high court of chancery, the said lord chancellor or lord keeper for the time being, shall have full power and authority to order and decree the same, as to his lordship shall be thought most fit to stand with equity and good conscience.

A remedy for any party grieved by the commissioners.

Inquiry as to Charities for the Benefit of Poor Prisoners, 22 & 23 Charles II. c. 20, s. 11, A. D. 1670.

22 & 23 Charles II. c. 20, s. 11. The chief justices and others directed to inquire into charities given for the benefit of poor prisoners.

It is enacted, that the two lord chief justices of the king's bench and common pleas, and the lord chief baron and justices of the peace, in their several jurisdictions, and all commissioners for charitable uses, do use their best endeavours and diligence to examine and find out the several legacies, gifts, and bequests bestowed and given for the benefit and advantage of the poor prisoners for debt in the several gaols and prisons in this kingdom, and to send for any deeds, wills, writings, and books of accounts whatsoever, and any person or persons concerned therein, and to examine them upon oath, and to make true discovery thereof, (which they have full power and authority hereby to do) and the same so found and ascertained, to order and settle in some manner and way, that the prisoners hereafter may not be defrauded, but receive the full benefit thereof according to the true intent of the donors (*l*).

7 & 8 William III. c. 37, A. D. 1696.

7 & 8 Will. III. c. 37.

An Act for the encouragement of Charitable Gifts and Dispositions (*m*).

(*l*) See 53 Geo. III. c. 113. 'An act for providing relief for the poor prisoners confined in the King's Bench, Fleet, and Marshalsea prisons.'

(*m*) The provisions of this act will be found *ante*, pp. 39, 40.

Statute restraining Gifts to Charitable Uses, 9 George II. c. 36, A. D. 1736.

An Act to restrain the Dispositions of Lands, whereby the same become unalienable (n).

9 Geo. II. c. 36. Preamble.

Whereas gifts or alienations of lands, tenements, or hereditaments, in mortmain, are prohibited or restrained by magna charta, and divers other wholesome laws, as prejudicial to and against the common utility; nevertheless, this public mischief has of late greatly increased, by many large and improvident alienations or dispositions made by languishing or dying persons, or by other persons, to uses called charitable uses, to take place after their deaths, to the disherison of their lawful heirs; for remedy whereof, be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and after the twenty-fourth day of June, which shall be in the year of our Lord one thousand seven hundred and thirty-six, no manors, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal (*o*), whatsoever, nor any sum or sums of money, goods, chattels, stocks in the public funds, securities for money, or any other personal estate whatsoever, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, shall be given, granted, aliened, limited, released, transferred, assigned, or appointed, or any ways conveyed or settled to or upon any person or persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or incumbered by any person or persons whatsoever, in trust, or for the benefit of any charitable uses whatsoever, unless such gift, conveyance, appointment, or settlement of any such lands, tenements, or hereditaments, sum or sums of money, or personal estate (other than stocks in the public funds), be, and be made by deed indented, sealed, and delivered in the presence of two or more credible witnesses, twelve calendar months at least before the death of such donor or grantor (including the days of the execution and death) and be enrolled in his majesty's high court of chancery within six calendar months next after the execution thereof (*p*); and unless such stocks be transferred in the public books, usually kept for the transfer of stocks, six calendar months at least before the death of such donor or grantor (including the days of the transfer and death), and unless

After 24 June, 1736, no manors, lands, &c. nor sums of money, goods, &c. to be given for charitable uses,

unless by deed indented and executed before two witnesses, 12 months before the death of the donor, and inrolled, &c.

(*n*) See *ante*, pp. 117—122.
(*o*) See *ante*, pp. 123, 124.
(*p*) See *ante*, pp. 129—131.

9 Geo. II. c. 36.

the same be made to take effect in possession for the charitable use intended, immediately from the making thereof, and be without any power of revocation, reservation (*q*), trust, condition, limitation, clause, or agreement whatsoever, for the benefit of the donor or grantor, or of any person or persons claiming under him.

The said limitations not to extend to purchases or transfers made for valuable considerations.

II. Provided always, that nothing herein before mentioned relating to the sealing and delivery of any deed or deeds twelve calendar months at least before the death of the grantor, or to the transfer of any stock six calendar months before the death of the grantor, or person making such transfer, shall extend, or be construed to extend, to any purchase of any estate or interest in lands, tenements, or hereditaments, or any transfer of any stock to be made really and *bonâ fide* for a full and valuable consideration actually paid at or before the making such conveyance or transfer, without fraud or collusion (*r*).

Gifts, &c. made after 24 June, 1736, otherwise than directed by this act, to be absolutely void.

III. And be it further enacted by the authority aforesaid, that all gifts, grants, conveyances, appointments, assurances, transfers, and settlements whatsoever, of any lands, tenements, or other hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any lands, tenements, or hereditaments (*s*), or of any stock, money, goods, chattels, or other personal estate, or securities for money to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect the same (*t*), to or in trust for any charitable uses whatsoever, which shall at any time, from and after the said twenty-fourth day of June, one thousand seven hundred and thirty-six, be made in any other manner or form than by this act is directed and appointed, shall be absolutely, and to all intents and purposes, null and void.

But not to prejudice the two universities, or the colleges of Eton, Winchester, or Westminster.

IV. Provided always, that this act shall not extend, or be construed to extend, to make void the dispositions of any lands, tenements, or hereditaments, or of any personal estate to be laid out in the purchase of any lands, tenements, or hereditaments, which shall be made in any other manner or form than by this act is directed, to or in trust for either of the two universities within that part of Great Britain called England, or any of the colleges or houses of learning within either of the said universities, or to or in trust for the colleges of *Eton*, *Winchester*, or *Westminster*, or any or either of them, for the better support and maintenance of the scholars only upon the foundations of the said colleges of *Eton*, *Winchester*, and *Westminster* (*u*).

(*q*) See *ante*, pp. 124—129.
(*r*) See *ante*, pp. 131—137; 9 Geo. IV. c. 85, *post*.
(*s*) See *ante*, pp. 154—168.
(*t*) See *ante*, pp. 168—194.
(*u*) See *ante*, pp. 247—255.

9 Geo. II. c. 36.

V. Provided nevertheless, and be it enacted by the authority aforesaid, that no such college or house of learning, which doth or shall hold or enjoy so many advowsons of ecclesiastical benefices, as are or shall be equal in number to one moiety of the fellows or persons usually styled or reputed as fellows, or, where there are or shall be no fellows, or persons usually styled or reputed as fellows, to one moiety of the students upon the foundation, whereof any such college or house of learning doth or may, by the present constitution of such college or house of learning, consist, shall, from and after the twenty-fourth day of June, one thousand seven hundred and thirty-six, be capable of purchasing, acquiring, receiving, taking, holding, or enjoying, any other advowsons of ecclesiastical benefices by any means whatsoever; the advowsons of such ecclesiastical benefices as are annexed to, or given for the benefit or better support of the headships of any of the said colleges or houses of learning, not being computed in the number of advowsons hereby limited (*v*).

No college to hold more advowsons than shall be equal to one moiety of their fellows, &c.

This act not to extend to Scotland.

VI. Provided always, that nothing in this act contained shall extend, or be construed to extend, to the disposition, grant, or settlement of any estate, real or personal, lying or being within that part of Great Britain called Scotland (*w*).

Lying-in Hospitals, 13 George III. c. 82, A.D. 1773.

An Act for the better regulation of Lying-in Hospitals, and other places appropriated for the charitable reception of pregnant Women; and also to provide for the Settlement of bastard Children born in such Hospitals and places.

13 Geo. III. c. 82. Preamble.

I. Whereas, through the humane and benevolent assistance of well-disposed persons, many hospitals and places have been established for the charitable reception of pregnant women, which have afforded great relief in times of the utmost distress, and therefore merit every due support and encouragement; but some inconveniences having been found to arise from the number of bastard children born in such hospitals and places, which have become heavy burdens, and have occasioned unreasonable charges upon those parishes wherein such hospitals and places have been instituted, to their great and unjust oppression: and whereas it would tend, as well to promote the interest of such hospitals and

(*v*) See 45 Geo. III. c. 101, *post*.

(*w*) See *ante*, pp. 122, 166—168, 172, 257—266.

13 Geo. III. c. 82.

places as to give a seasonable relief to such parishes, if a law was made to regulate the settlement of such bastard children; may it please your majesty that it may be enacted, and be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that, from and after the first day of November, one thousand seven hundred and seventy-three, no hospital or place shall be established, used or appropriated, or continue to be used or appropriated, for the public reception of pregnant women, under public or private support, regulation and management, in any parish within that part of Great Britain called *England*, unless a license shall be first had and obtained, in manner hereafter mentioned, from the justices of the peace, at some one of their general quarter sessions to be held for the county, riding, division, city, or corporation, wherein such hospital or place shall be situated; and such justices are hereby authorised and required to grant such license to any person or persons who shall apply for the same, such person or persons paying the sum of forty shillings for every such license to the clerk of the peace of such county, riding, or division, or to the town clerk of such city or corporation, as a perquisite for his trouble, and as a fund to defray the expense of the stamp and parchment that shall be used for the grant of such license.

After Nov. 1, 1773, no hospital to be established for the reception of pregnant women, unless a license be obtained;

which license the justices, at their quarter sessions are empowered to grant.

Every license to be stamped with a 5*s.* stamp, and signed by the justices.

II. And be it further enacted, that every such license shall be written on parchment, and stamped with a five shilling stamp; and a copy thereof shall be entered in a book to be kept for that purpose by such clerk of the peace, or town clerk, and preserved as a public register amongst the records of the county, riding, division, or of such city or corporation, as the case may be, to be inspected by any person or persons on payment of one shilling; and every such license shall be signed by two or more such justices of the peace at their general quarter sessions, and shall entitle the person or persons to whom such license shall be granted to keep one hospital, house, or place, and no more, for the public or charitable reception of pregnant women.

Hospitals now or hereafter to be established for the reception of pregnant women, deemed within the intent of this act.

III. And be it further enacted, that as well all hospitals, houses, and places already established, used or appropriated for the public reception of pregnant women, and supported by charitable contributions, or otherwise, for the purposes of the delivery or lying-in of such pregnant women, as all other hospitals, houses, or places, that may hereafter be established, used, and appropriated, in like manner, for the like purposes, shall be deemed and taken to be hospitals and places within the true intent and meaning of this act.

IV. And, that it may be the more easily known what hos-

pitals, houses, or places, shall have been licensed pursuant to this act, be it enacted, that there shall be fixed and kept up over the door or public entrance of every such hospital, house, or place, an inscription, in large letters, in the following words; *videlicet, Licensed for the public reception of pregnant women, pursuant to an act of parliament passed in the thirteenth year of the reign of King George the Third,* and the affixing and keeping such inscription shall be a condition in every such license; and in case such inscription shall not be fixed and kept over the door or public entrance of such hospital, house or place, such license shall become null and void. 13 Geo. III. c. 82. Inscription to be affixed over the door of all hospitals.

The substance only of the following sections of this act is stated :—

V. Bastard children born in such hospitals not to be entitled to relief as a parishioner (*x*).

VI. On the removal of the mother or child, the churchwardens of the parish are to pay all expenses.

VII. Appeal may be made to quarter sessions by persons aggrieved, giving fourteen days' notice.

VIII. Parish officers are impowered to apprehend the fathers of any bastard.

IX. Proviso, that act shall not alter the law of settlement of bastards where mothers' settlements are unknown.

X. Owners or masters of hospitals to take the woman, before admitted, to be examined before a justice.

XI. If the woman produce an affidavit that she is married or single, she is not liable to go before the justice.

XII. When any woman shall be delivered of a bastard, the owner of the hospital is to give four days' notice before she is discharged to the overseers.

XIII. Overseer attending, and being informed that such woman is not sufficiently recovered, shall wait till a further notice be given.

XIV. Every woman may be kept in the hospital till she be in a fit condition to be discharged, &c.

XV. But not to extend to keep any woman longer than six weeks, without her consent.

XVI. Owners, governors, &c. not complying with the directions of this act to forfeit 50*l.*; and overseers, &c. neglecting or refusing, to forfeit 10*l.* Penalties may be recovered by action in the courts of record at Westminster, or by information; half penalty to be applied for use of poor, other half to go to the informer.

XVII. General issue may be pleaded, and defendant to have treble costs in case of non-suit, &c.

(*x*) See Poor Law Amendment Act, 4 & 5 Will. IV. c. 76, ss. 69—76.

13 Geo. III. c. 83.

XVIII. Actions to be commenced within six months after offence.

XIX. This act to be deemed a public act.

Gifts to Queen Anne's Bounty, 43 George III. c. 107, 27 July, 1803.

An Act for effectuating certain parts of an Act, passed in the second and third years of the reign of her late Majesty Queen Anne, intituled, An Act for the making more effectual her Majesty's gracious intentions for the augmentation of the Maintenance of the poor Clergy, by enabling her Majesty to grant, in perpetuity, the revenues of the First Fruits and Tenths; and also for enabling any other Persons to make Grants for the same purpose, so far as the same relate to Deeds and Wills made for granting and bequeathing Lands, Tenements, Hereditaments, Goods, and Chattels, to the Governors of the Bounty of Queen Anne, for the purposes in the said Act mentioned; and for enlarging the Powers of the said Governors.

43 Geo. III. c. 107.

2 & 3 Anne, c. 11, reciting that persons were empowered to grant estates, &c. in their own right to the governors of the bounty of Queen Anne, towards the augmentation of the maintenance of the clergy.

WHEREAS by an act, made in the second and third years of the reign of her late majesty Queen Anne, intituled, *An Act for the making more effectual her majesty's gracious intentions for the augmentation of the maintenance of the poor Clergy, by enabling her majesty to grant, in perpetuity, the revenues of the first fruits and tenths; and also for enabling any other persons to make grants for the same purpose;* after reciting, amongst other things, that for the encouragement of such well disposed persons as should, by her majesty's royal example, be moved to contribute to so pious and charitable a purpose, and that such their charity might be rightly applied, it was amongst other things enacted, that all and every person and persons having in his or their own right any estate or interest, in possession, reversion, or contingency, of or in any lands, tenements, or hereditaments, or any property of or in any goods or chattels, should have full power, license, and authority, at his, her, and their will and pleasure, by deed enrolled in such manner and within such time as is directed by the statute made in the twenty-seventh year of the reign of King Henry the Eighth, for enrolment of bargains and sales, or by his, her, or their last will or testament in writing, duly executed according to law, to give and grant to and vest in the corporation thereby authorised, and since erected under the name of *The Governors of the Bounty of Queen Anne*, and their successors, all such his, her,

or their estate, interest, or property in such lands, tenements, and hereditaments, goods, and chattels, or any part or parts thereof, for and towards the augmentation of the maintenance of such ministers officiating in such church or chapel where the liturgy and rites of the said church were or should be so used or observed, as in the same act were mentioned, and having no settled competent provision belonging to the same, and to be for that purpose applied according to the will of the said benefactor, in and by such deed enrolled, or by such will or testament executed as aforesaid expressed, and in default of such direction, limitation, or appointment, in such manner as by her majesty's letters patent should be directed or appointed as aforesaid, and such corporation and their successors, should have full capacity and ability to purchase, receive, take, hold, and enjoy for the purposes aforesaid, from such persons as should be so charitably disposed to give the same, any manors, lands, tenements, goods, or chattels, without any license or writ of *ad quod damnum*, the statute of mortmain or any other statute or law to the contrary notwithstanding. And it was by the same act provided, that that act, or any thing therein contained, shall not extend to enable any person or persons being within age, or of non-sane memory, or women covert without their husbands, to make any such gift, grant, or alienation, any thing in that act contained to the contrary in any wise notwithstanding. And whereas the beneficial effect and operation of the said act have been considerably obstructed and retarded by an act, passed in the ninth year of the reign of his late majesty King George the Second, intituled, *An Act to restrain the Disposition of Lands, whereby the same become unalienable:* For remedy thereof, be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that so much of the said act of her late majesty Queen Anne, as is herein recited, shall be and remain in full force and effect, the said act of his late majesty King George the Second, or any other act or law to the contrary notwithstanding (*y*).

43 Geo. III. c. 107.

9 Geo. II. c. 36.

So much of the recited act of 2 & 3 Anne shall remain in force, notwithstanding 9 Geo. II. c. 36.

II. And whereas by an act, passed in the first year of the reign of his late majesty King George the First, intituled, *An Act for making more effectual her late majesty's gracious intentions for augmenting the maintenance of the poor Clergy*, it was amongst other things enacted, that it should be lawful, with the concurrence of the said governors of the Bounty of Queen Anne, and the incumbent, patron, and ordinary of any augmented living or cure to exchange all or any part of the

1 Geo. I. c. 10, power of exchanging lands, &c. thereby granted, extended to every augmented living.

(*y*) See *ante*, pp. 51, 52, 171, 172.

43 Geo. III. c. 107.

estate settled for the augmentation thereof, for any other estate in lands or tithes of equal or greater value, to be conveyed to the same uses; be it also enacted, that the said power shall be, and the same is hereby extended to all the messuages, buildings, and lands belonging to every such augmented living or cure.

Where there is no suitable parsonage house, the governors may provide one.

III. And be it further enacted, that where a living shall have been or shall be augmented by the said governors, either by way of lot or benefaction, and there is no parsonage house suitable for the residence of the minister, it shall and may be lawful for the said governors, and they are hereby empowered, from time to time, in order to promote the residence of the clergy on their benefices, to apply and dispose of the money appropriated for such augmentation, and remaining in their hands, or any part thereof, in such manner as they shall deem most advisable, in or towards the building, re-building, or purchasing a house, and other proper erections within the parish, convenient and suitable for the residence of the minister thereof, which house shall for ever thereafter be deemed the parsonage house appertaining to such living, to all intents and purposes whatsoever: any thing in any act or acts, or the rules of the said governors contained to the contrary notwithstanding.

Building of New Churches, 43 George III. c. 108, 27 July, 1803.

An Act to promote the Building, Repairing, or otherwise providing of Churches and Chapels, and of Houses for the Residence of Ministers, and the providing of Church Yards and Glebes (*z*).

43 Geo. III. c. 108.

Whereas a sufficient number of churches and chapels for the celebration of divine service, according to the rites and ceremonies of the united church of England and Ireland, and of mansion houses with competent glebes for the residence of ministers officiating in such churches and chapels, is necessary towards the promotion of religion and morality: and whereas the same are either wholly wanting or materially deficient in many parts of England and Ireland: and whereas many well-disposed persons would be desirous of contributing towards the supply of such defects, if they were enabled so to do in the manner hereinafter directed: may it therefore please your majesty that it may be enacted, and be it enacted by the king's most excellent majesty, by and with the

(*z*) *Ante*, pp. 53—55.

advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that all and every person and persons having in his or their own right any estate or interest in possession, reversion, or contingency, of or in any lands or tenements, or of any property of or in any goods or chattels, shall have full power, license, and authority, at his and their will and pleasure, by deed enrolled in such manner, and within such time, as is directed in England by the statute made in the twenty-seventh year of the reign of King Henry the Eighth, and in Ireland by the statute made in the tenth year of the reign of King Charles the First, for enrolment of bargains and sales, or by his, her, or their last will or testament in writing duly executed according to law, such deed, or such will or testament, being duly executed three calendar months at least before the death of such grantor or testator, including the days of the execution and death, to give and grant to and vest in any person or persons, or body politic or corporate, and their heirs and successors respectively, all such his, her, or their estate, interest, or property in such lands or tenements, not exceeding five acres, or goods and chattels, or any part or parts thereof, not exceeding in value 500*l.*, for or towards the erecting, rebuilding, repairing, purchasing, or providing any church or chapel where the liturgy and rites of the said united church are or shall be used or observed, or any mansion house for the residence of any minister of the said united church officiating, or to officiate in any such church or chapel, or of any out-buildings, offices, church yard, or glebe, for the same respectively, and to be for those purposes applied, according to the will of the said benefactor in and by such deed enrolled, or by such will or testament executed as aforesaid expressed, the consent and approbation of the ordinary being first obtained, and in default of such direction, limitation, or appointment, in such manner as shall be directed and appointed by the patron and ordinary, with the consent and approbation of the parson, vicar, or other incumbent; and such person and persons, bodies politic and corporate, and their heirs and successors respectively, shall have full capacity and ability to purchase, receive, take, hold, and enjoy, for the purposes aforesaid, as well from such persons as shall be so charitably disposed to give the same, as from all other persons as shall be willing to sell or aliene to such person or persons, bodies politic or corporate, any lands or tenements, goods, or chattels, without any license or writ of *ad quod damnum*, the statute of mortmain, or any other statute or law to the contrary notwithstanding. Provided always, that this act or anything therein contained, shall not extend to enable any person or persons

43 Geo. III. c. 108.

Persons by deed or will may give lands not exceeding five acres, or goods and chattels not exceeding 500*l.* for the purposes of this act.

But such powers not to extend to

43 Geo. III. c. 108.

persons within age, insane, or femes covert.

being within age, or of non-sane memory, nor women covert without their husbands, to make any such gift, grant, or alienation; anything in this act contained to the contrary in anywise notwithstanding.

Only one such gift shall be made by one person, and where it exceeds five acres or 500*l.* the chancellor may reduce it.

II. Provided also, and it is hereby further enacted, that no more than one such gift or devise shall be made by any one person, and that if any such gift or devise as aforesaid shall happen to exceed five acres in lands or tenements, or the value of 500*l.* in goods and chattels, every such gift or devise shall be good and valid to the extent aforesaid; and it shall be lawful for the lord chancellor for the time being, on petition, to make order for reducing every such gift or devise to and within the said limits, and for allotting such specific five acres, and if occasion should require, such specific goods and chattels as in his judgment shall be most convenient, and to make such further order touching the premises as to him shall appear just and reasonable.

No glebe upwards of 50 acres shall be augmented with more than one acre.

III. Provided also, that no glebe containing upwards of fifty acres, shall be augmented with more than one acre under or by virtue of this act, but that the excess, if any given or devised for the purpose of such augmentation, shall be reduced in manner aforesaid, by the said lord chancellor, and such order thereupon shall be by him made as hereinbefore is directed in the case of an excess beyond five acres.

Plots of land not exceeding one acre held in mortmain, lying convenient to be annexed to some church, &c. may be granted either by exchange or benefaction for that purpose.

IV. And whereas it often happens that small plots of land held in mortmain lie convenient to be annexed to some such church or chapel, or house of residence, as aforesaid, or to some church yard, or curtilage thereto belonging, or convenient to be employed as the site of some such church or chapel, or house to be hereafter erected, and for the necessary and commodious use and enjoyment thereof, and that they might be so employed to the advantage of the public, and without detriment to the proprietors thereof, if they were enabled to give and grant the same for the purposes aforesaid; be it therefore further enacted, that it shall be lawful for every body politic or corporate, sole or aggregate, by deed enrolled as aforesaid, with or without confirmation, as the law may require, to give and grant, either by way of exchange or benefaction, any such small plot of land not exceeding one acre, to any person or persons, body politic or corporate, his and their heirs and successors respectively, to be held, used, and applied for the purposes aforesaid; and such last-mentioned person and persons, bodies politic and corporate, and their heirs and successors respectively, shall have full capacity and ability, with consent of the incumbent, patron, and ordinary, to take, hold, and enjoy such small plot of land for the purposes aforesaid, without any license or writ of *ad quod dam-*

mum, the statute of mortmain, or any other act or law to the contrary notwithstanding. 43 Geo. III. c. 108.

V. Provided also, and it is hereby further enacted and declared, that in every parochial church or chapel hereafter to be erected, ample provision shall be made for the decent and suitable accommodation of all persons, of what rank or degree soever, who may be entitled to resort to the same, and whose circumstances may render them unable to pay for such accommodations. Accommodation to be provided for persons resorting to church, &c.

VI. Provided also, that nothing in this act contained shall be construed to take away or abridge any right of giving or devising which already exists in any person whatsoever. Rights of giving or devising not affected.

QUEEN ANNE'S BOUNTY, 45 GEORGE III. c. 84, 2d July, 1805.

An Act for making more effectual the gracious intentions of her late Majesty Queen Anne, for the augmentation of the maintenance of the poor Clergy, so far as relates to the returns of Certificates into the Exchequer and Gifts of Personal Property.

WHEREAS by an act passed in the first year of the reign of his late majesty King George the First, intituled, *An Act for making more effectual her late majesty's gracious intentions for augmenting the maintenance of the poor Clergy*, the respective bishops of every diocese were empowered from time to time, as they should see occasion, and as might best serve the purposes of the said Bounty to the poor clergy, to inform themselves by such means as in the said act are mentioned, of the clear improved yearly value of every benefice with cure of souls, living, and curacy, and of the true and clear improved yearly value of the maintenance of every parson, vicar, curate, and minister officiating in any such churches or chapels as are therein mentioned, and how such yearly values arose, with the other circumstances thereof, and the same to certify to the said governors, for their better information in the premises; in which said act is contained a proviso, that where by certificates returned into her said majesty's court of exchequer at Westminster, pursuant to an act made in the fifth year of her reign, intituled, *An Act for discharging small Livings from their first fruits and tenths, and all arrears thereof;* and one other act made in the sixth year of her reign, intituled, *An Act to enlarge the Time for returning the certificates of all ecclesiastical livings not exceeding the yearly value of fifty pounds, and for other purposes*, or either of them, or made good by the said recited act of the first 45 Geo. III. c. 84. 1 Geo. III. c. 10. 5 Anne, c. 24. 6 Anne, c. 27.

45 Geo. III. c. 84.

year of King George the First, the yearly value of any livings not exceeding the clear yearly value of 50*l.* were particularly and duly expressed and specified, such certificates should ascertain the yearly values of such livings, in order to their being augmented by the said governors, and no new or different valuation thereof should be returned to the said governors by virtue of the said recited act: and whereas since the time that such certificates were returned into the exchequer, in pursuance of the said acts of the fifth and sixth of her said late majesty Queen Anne, many livings in such certificates mentioned, and thereby returned as not exceeding the clear yearly value of 50*l.* for the purpose of being discharged from first fruits and tenths, are by subsequent improvement of their glebes and tithes, and by inclosures and other means, become of much greater value; and in order that the Bounty of her said late majesty may be applied as was originally intended, for the augmentation of small livings, in places where the same are not already sufficiently provided for, and that her majesty's gracious intentions for the relief of the poor clergy may be more speedily and effectually carried into execution, it is become expedient that the governors of the said Bounty should be empowered to receive new valuations of such livings as were so returned into the exchequer: may it therefore please your majesty that it may be enacted; and be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled,

Bishops and guardians to inquire into value of benefices returned into the exchequer, and certify the same to the governors of Queen Anne's Bounty, who shall be empowered to act upon such new certificate as they are now enabled to do with respect to livings not returned into the exchequer.

and by the authority of the same, that the respective bishops of every diocese, and the guardians of spiritualities *sede vacante*, shall be and are hereby empowered from time to time as they shall see occasion, and as may best serve the purposes of the said Bounty to the poor clergy, by such ways and means as in the said act of the first year of his majesty King George the First, are mentioned in that behalf, to inform themselves of the clear improved yearly value of such benefices with cure of souls, livings, and curacies as were returned into the exchequer in pursuance of the said acts of the fifth and sixth years of the reign of her said late majesty Queen Anne, within their several dioceses, or within any peculiars or places of exempt jurisdiction within the bounds and limits of their respective dioceses, or adjoining or contiguous thereto, although the same be exempt from the jurisdiction of any bishop in other cases, and how such yearly values arise, with the other circumstances thereof; and the same or such of them, whereof they shall have fully informed themselves, from time to time with all convenient speed to certify to the said governors of the Bounty of Queen Anne, for the augmentation of the maintenance of the poor clergy,

for their better information in the premises; and the said governors are hereby authorized and empowered, with respect to the augmentation of such livings, so formerly certified into the exchequer as aforesaid, to act upon and be guided by such new certificates of the value and other circumstances thereof, made in pursuance of this act, as fully and effectually to all intents and purposes as they are in and by the said first herein-before mentioned and in part recited act, enabled to do with regard to such livings as were not so certified into the exchequer, and as if the restraint of the said proviso therein had not been made, the same proviso or any thing in the said recited act to the contrary thereof in anywise notwithstanding.

Not to affect livings with respect to their discharge from first fruits and tenths.

II. Provided always, and be it enacted, that such certificates as were returned into the exchequer for the purpose of ascertaining what livings were to be discharged from first fruits and tenths, shall not, so far as the same relate to the first fruits and tenths, be affected or altered in any manner whatsoever by any thing in this act contained.

For facilitating the intentions of persons disposed to contribute towards augmentation of livings.

III. And in order to facilitate the intentions of all such persons as may be disposed to contribute to the augmentation of such livings and curacies as are within the meaning of the laws now in force, respecting the said bounty; be it further enacted, that it shall be lawful for any person or persons having in his, her, or their own right, any money, goods, chattels, or other personal effects, at his, her, or their will and pleasure, to give or grant to, or vest in the said governors of the Bounty of Queen Anne and their successors, to be by them disposed of according to law, all or any part of such money, goods, chattels, or other personal effects, without any deed or deeds, either enrolled or not enrolled, in like manner as he, she, or they could or might have done, either by deed or deeds enrolled or otherwise, before the passing of this act, any statute or law to the contrary in anywise notwithstanding.

Not to affect the laws respecting the gift or conveyance of lands, &c.

IV. Provided nevertheless, that nothing herein contained shall in any manner alter or affect the law now in force respecting the gift or conveyance of any lands, tenements, or hereditaments, by any deed or deeds, or the disposition thereof, or of any goods, chattels, or other personal property, by will or testament (*a*).

(*a*) *Ante*, pp. 255.

Gifts to Colleges in the Two Universities, 45 George III. c. 101, 10th July, 1805.

An Act to Repeal so much of an Act, passed in the Ninth Year of the Reign of his late Majesty King George the Second, intituled, An Act to restrain the Disposition of Lands, whereby the same become unalienable, as restrains Colleges within the Two Universities of Oxford and Cambridge from purchasing or holding Advowsons, except as therein is provided.

46 Geo. III. c. 84.

9 Geo. II. c. 36.

WHEREAS it is amongst other things provided by an act, passed in the ninth year of the reign of his late majesty King George the Second, intituled, *An Act to restrain the Disposition of Lands, whereby the same become unalienable*, that no college or house of learning in either of the two universities within that part of the United Kingdom called *England*, which doth or shall hold or enjoy so many advowsons of ecclesiastical benefices as are or shall be equal in number to one moiety of the fellows, or persons usually styled or reputed as fellows, or where there are or shall be no fellows, or persons usually styled or reputed as fellows, to one moiety of the students upon the foundation whereof any such college or house of learning doth or may by the present constitution of such college or house of learning consist, shall, from and after the 24th day of June, 1736, be capable of purchasing, acquiring, receiving, taking, holding, or enjoying, any other advowsons of ecclesiastical benefices by any means whatever, the advowsons of such ecclesiastical benefices as are annexed to or given for the benefit or better support of the headships of any of the said colleges or houses of learning, not being computed in the number of advowsons hereby limited (*b*): and whereas the above restriction has been found by experience to operate to the prejudice of such colleges or houses of learning, by rendering the succession too slow: and whereas the removal of such restriction will be for the benefit of such colleges or houses of learning, and of the said universities, and will tend to the promotion of learning, and to the providing a better supply of fit and competent parochial ministers; be it therefore enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that so much of the said statute as is hereinbefore recited shall be and the same is hereby repealed.

So much of recited act as restrains colleges from purchasing or holding advowsons, repealed.

(*b*) *Ante*, pp. 247, 248, 827.

Building of Churches, Chapels, and Parsonage Houses, 51 George III. c. 115, 26th June, 1811.

An Act for amending the Act of the 43 *George III., to promote the building, repairing, or otherwise providing the Churches and Chapels, and of Houses for the residence of Ministers, and the providing of Church Yards and Glebes* (*c*).

Whereas by an act passed in the forty-third year of his present majesty's reign, intituled, *An Act to promote the building, repairing, or otherwise providing of Churches and Chapels, and of Houses for the residence of Ministers, and the providing of Church Yards and Glebes;* it was enacted, that every person and persons having in his or their own right any estate or interest in possession, reversion, or contingency of or in any lands or tenements, or of any property of or in any goods or chattels, should have full power, license, and authority, by deed enrolled, in such manner, and within such time as is directed in *England* by the statute made in the twenty-seventh year of the reign of King Henry the Eighth, and in *Ireland* by the statute made in the tenth year of the reign of King Charles the First, for enrolment of bargains and sales; or by his, her, or their last will or testament in writing, duly executed according to law, such deed or such will or testament being duly executed three calendar months at least before the death of such grantor or testator, including the days of the execution and death, to give and grant to and vest in any person or persons, or body politic or corporate, and their heirs and successors respectively, all such his, her, or their estate, interest, or property in such lands or tenements not exceeding five acres, or goods and chattels, or any part or parts thereof, not exceeding in value 500*l.*, for or towards the erecting, rebuilding, repairing, purchasing, or providing any church or chapel where the liturgy and rites of the said united church are or shall be used or observed, or any mansion house for the residence of any minister of the said united church, officiating or to officiate in any such church or chapel, or of any outbuildings, offices, church yard, or glebe for the same respectively, and to be for those purposes applied according to the will of the said benefactor in and by such deed enrolled, or by such will or testament executed as aforesaid expressed (the consent and approbation of the ordinary being first obtained), and in default of such direction, limitation, or appointment, in such manner as shall be directed and appointed by the patron and ordinary, with the consent and approbation of the parson, vicar, or other incumbent; and

51 Geo. III. c. 115.
43 Geo. III. c. 108.

(*c*) *Ante*, pp. 832—835, 53—55, & n. (*i*).

51 Geo. III. c. 115.

such person and persons, bodies politic and corporate, and their heirs and successors respectively, should have full capacity and ability to purchase, receive, take, hold, and enjoy for the purposes aforesaid, as well from such persons as shall be so charitably disposed to give the same, as from all other persons as shall be willing to sell or alien to such person or persons, bodies politic or corporate, any lands or tenements, goods or chattels, without any license or writ of *ad quod damnum:* and whereas doubts have arisen whether the powers and provisions of the said act will enable his majesty to make any such grant for the purposes before mentioned: and whereas it is expedient that the powers of the said act should be extended for that purpose; be it therefore enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that the king's most excellent majesty, his heirs and successors, shall have full power, license, and authority, by deed or writing under the great seal, or under the seal of his duchy and county palatine of *Lancaster*, to give and grant and vest in any person or persons, bodies politic or corporate, and their heirs and successors respectively, all such his, her, or their estate, interest, or property in any lands or tenements within the survey of the court of exchequer, or of the duchy of *Lancaster*, for or towards the erecting, rebuilding, repairing, purchasing, or providing any church or chapel where the liturgy and rites of the said united church are or shall be used or observed, or any mansion house for the residence of any minister of the said united church officiating or to officiate in any such church or chapel, or of any outbuildings, offices, church yard or glebe for the same respectively, and to be for those purposes applied in and by such deed as aforesaid expressed, the consent and approbation of the ordinary being first obtained, and such person and persons, bodies politic and corporate, and their heirs and successors respectively, shall have full capacity and ability to receive, take, hold, and enjoy for the purposes aforesaid, any lands or tenements notwithstanding the statute of mortmain, or the act of the first year of her late majesty Queen Anne, intituled, *An Act for the better Support of Her Majesty's Household, and the Honour and Dignity of the Crown*, or any other act or acts, or other impediment or disability whatsoever: provided always, that nothing in this act contained shall extend or be construed to extend to enable his majesty, his heirs and successors, to grant more than five acres in any one grant for any of the purposes aforesaid, or to alter or amend any of the provisions of the said act of the forty-third year of his present majesty, which are not hereinbefore specially named and mentioned.

His majesty may vest lands in any person for building or repairing any church or chapel, or any house for the residence of a minister.

1 Anne, c. 7.

No grant to exceed five acres.

51 Geo. III. c. 115.

II. And be it further enacted, by the authority aforesaid, that it shall be lawful for any person or persons, bodies politic or corporate, seized of or entitled to the entire and absolute fee simple of any manor, by deed under the hand and seal or hands and seals of any such person or persons, and under the seal or seals of any such body or bodies politic or corporate, and enrolled in the court of chancery, to grant to the rector, vicar, or other minister of any parish church and his successors, or to the curate or minister of any chapel and his successors, any parcel or parcels of land not exceeding in the whole the quantity of five statute acres, parcel of the waste of such manor, and lying within the parish where such church or chapel shall be or shall be intended to be erected, or within any extra parochial district wherein any such chapel shall be or shall be intended to be erected, for the purpose of erecting thereon or enlarging any such church or chapel, or for a church yard or burying ground, or enlarging a church yard or burying ground for such parish or extra parochial place, or for a glebe for the rector, vicar, curate, or other minister of any such church or chapel, to erect a mansion house or other buildings thereon, or make other conveniences for the residence of such rector, vicar, curate, or other minister, freed and absolutely discharged of and from all rights of common thereon, and any statute prohibiting any alienation in mortmain, or other statute, law, or custom to the contrary notwithstanding: provided always, that no grant whatsoever shall be made of any land whatsoever, for any of the purposes authorised by this act, unless the church or chapel for the benefit whereof or of the minister whereof such grant shall be made, shall be a parochial church or chapel for the service of the united church of *England* and *Ireland*, duly authorised by law, or a church or chapel duly consecrated for the service of such church, or erected or to be erected for such purpose by and with the license and consent of the ordinary of the diocese wherein the same shall be.

Any person having the fee simple of any manor may grant five acres of the waste for ecclesiastical purposes.

Grants restricted to parochial churches or chapels.

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52 George III. c. 101, 9 July, 1812.

An Act to provide a summary Remedy in cases of Abuses of Trusts created for Charitable Purposes.

The two first sections of this act are stated verbatim ante, pp. 481—483; *the third section exempted proceedings under it from stamp duty* (*d*).

(*d*) See 5 Geo. IV. c. 41, to repeal certain duties on law proceedings.

Registration of Charitable Donations, 52 George III. c. 102, 9th July, 1812.

An Act for the registering and securing of Charitable Donations (*e*).

52 Geo. III. c. 102.

Whereas charitable donations have been given for the benefit of poor and other persons in *England* and *Wales* to a very considerable amount, and many of the aforesaid donations appear to have been lost, and others from the neglect of payment, and the inattention of those persons who ought to superintend them, are in danger of being lost, or rendered very difficult to be preserved; be it therefore enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that a memorial or statement of the real and personal estate, and of the gross annual income, investment, and the general and particular objects of all and every charity and charities, and charitable donations, for the benefit of any poor or other persons, in any place in *England* and *Wales*, which shall have been founded, established, made, benefited, increased, or secured, together with the names of the respective founders of or benefactors thereto, where known, and also of the person or persons in whose custody, possession, or control, the deeds, wills, and other instruments whereby such charities or charitable donations shall have been founded, established, made, benefited, increased, or secured, may be, and also of the names of the then trustee or trustees, feoffee or feoffees, possessor or possessors of such real or personal estate, shall, from and after six calendar months after the passing of this act, be registered by such person or persons who shall then be the trustee or trustees, feoffee or feoffees, possessor or possessors thereof, or some or one of such persons, in manner and in the form contained in the schedule to this act annexed, in the office of the clerk of the peace of the county, or city or town being a county of itself, within which such poor or other persons shall be; and such memorial or statement shall be signed by such person or persons causing the same to be registered and left in the said office of such clerk of the peace, who shall forthwith transmit a duplicate or copy of the same unto the enrolment office of the high court of chancery.

A memorial of deeds, &c. respecting charitable donations already founded to be registered.

II. And be it further enacted, that wherever any such charity or charitable donations shall be founded, established, made or benefited, increased or secured by any deed, will, or

The like of charitable donations which may

(*e*) See *ante*, p. 302, n. (*g*).

other instrument hereafter to be made or executed by any person or persons, that then a like memorial or statement, according to the directions herein-before contained, shall be registered, and left and transmitted as aforesaid, by such person or persons as are herein-before mentioned, within twelve months after the decease of such person or persons by whom any such will, deed or deeds, or other instrument, shall have been made or executed.

58 Geo. III. c. 103.

hereafter be founded.

III. And be it further enacted, that for the purpose of such registries of such memorials or statements, the clerk of the peace for the time being of each and every county, or city or town being a county of itself, or riding within *England* and *Wales*, shall, as there shall be occasion, provide proper books of parchment or vellum, wherein such registers shall be made and entered; and every such original memorial or statement, and every such book provided as aforesaid, shall be carefully kept and preserved for public use and inspection in the office to which it shall belong, together with a correct index, to be made from time to time by such clerk of the peace, of such charities and charitable donations, distinguishing each by the name of the original, or first donor or founder thereof, where known, or the appellation or title most generally used for such charity or charitable donations.

Clerks of the peace to provide proper books wherein registries shall be made.

IV. And be it further enacted, that in case the persons to be benefited by any such charity or charitable donations as aforesaid, shall not be wholly within any one county, then and in such case such clerk of the peace of the county where any such charity or charitable donation shall be registered, shall forthwith notify in the *London Gazette* the name or title thereof, according to the appellation or title used in the index aforesaid, and the names of the several places wherein the objects of such charity or charitable donations shall be, and the particular or general objects thereof, and also the name of the county wherein such memorial or statement shall have been registered.

Notice to be given in the *London Gazette* if persons to be benefited shall not be wholly within one county.

V. And be it further enacted, that if any such charity or charitable donation shall not be duly memorialized, stated, and registered according to the provisions of this act, it shall and may be lawful for any two persons or more, interested in such charity or charitable donation, to present a petition to the lord chancellor, lord keeper, or lords commissioners for the custody of the great seal, or master of the rolls for the time being, or the court of exchequer, complaining thereof; and they are hereby required to hear such petition in a summary way, and upon affidavits, or such other evidence as shall be produced upon such hearing, to determine the same, and to make such order therein, and with respect to the costs

If donations shall not be registered, a petition may be presented to the lord chancellor, &c. complaining thereof.

of such application and proceedings, as to him or them shall seem fit, and which order shall be final and conclusive.

No proceedings to decide any right or title.

VI. Provided always, and be it further enacted, that no proceedings under the provisions herein-before mentioned, shall extend, or be construed to extend, to decide any right or title as to the property that shall be so registered, or as to the persons who shall be entitled, or claim to be entitled, to the benefit thereof, or any interest therein.

Clerk of the peace to make searches and give copies of registers.

VII. And be it further enacted, that all and every clerk of the peace of the several counties and ridings in *England* and *Wales*, shall, as often as required, make searches concerning all memorials and statements directed by this act to be entered in his or their office as aforesaid, and shall also give copies of the same under his hand, if required by any person whatsoever, who shall tender or be willing to pay him the sum or sums herein-after directed to be allowed to him for such copies of such memorials or statements as aforesaid.

Allowance to clerk of the peace;

VIII. And be it further enacted, that every such clerk of the peace shall be allowed, for the registering every such memorial or statement as is by this act directed, the sum of four shillings, and no more, in case the same do not exceed four hundred words; but if such memorial or statement shall exceed four hundred words, then after the rate and proportion of one shilling an hundred for all the words contained in such entry, and the like fees for the like number of words contained in every copy of any entry given out of the said register, and no more; and for every notification in the *London Gazette* the costs of such notification, and the further sum of ten shillings for drawing and inserting the same, and transmitting the duplicate or copy herein-before mentioned unto the enrolment office of the high court of chancery, and no more.

and to the person inserting notification in the Gazette.

Further time to be allowed to register memorial where difficulties occur in preparing the same.

IX. And be it further enacted, that where any difficulty shall occur in making and preparing such memorial or statement as aforesaid, so as to render it necessary to employ any longer time than is allowed by the provisions of this act for registering such memorial or statement as herein-before is mentioned, it shall and may be lawful for the court of quarter sessions for the county, or city or town being a county of itself, wherein such memorial or statement is intended to be registered, to allow, on application made to them, and on examination of the circumstances, such further time, not exceeding six calendar months, as to such court shall seem necessary to be given for the purpose of duly registering such memorial or statement as herein-before is mentioned.

Costs attending the prepar-

X. And be it further enacted, that it shall and may be lawful for the court of quarter sessions of the county, or city

or town being a county of itself, wherein such statement or memorial shall have been registered, to allow such reasonable costs and charges attending the preparing and registering, notifying and transmitting such memorial or statement, with reference to the income of the charity or charitable donation, to such person or persons causing the same to be registered, as such court shall think fit; and it shall and may be lawful for such person or persons who shall have caused such memorial or statement to be registered, to deduct out of the income, funds, rents, and profits, in his or their hands, of such charity or charitable donation so by him or them memorialized, and stated, and registered, the sum and sums so allowed, and no more: provided always, that the said court of quarter sessions shall not allow any sum whatever for and in respect of such costs and charges, unless it shall be stated to them, upon the declaration in writing of the person or persons applying for such allowance, and signed by him or them, that such memorial or statement is to the best of his, her, or their knowledge and belief, true in every respect, and that it doth contain to the best of his, her, or their knowledge and belief, a true and full account of the real and personal estate, annual gross income, investment, and the particular or general objects of the charity or charitable donation of which such memorial or statement shall have been registered, together with the names of the respective donors or benefactors thereto, where known, and also of the person or persons in whose custody, possession, or control, the deeds, wills, and other instruments herein-before mentioned, shall at such time be, and also the names of the trustee or trustees, feoffee or feoffees, possessor or possessors of such real and personal estate: provided always, that none of the provisions herein-before contained shall be construed to extend to any charity or charitable donation not issuing out of or secured upon any lands, tenements, or hereditaments, or directed by the founder or donor thereof to be secured thereon, or to be permanently invested in government or any public stocks or funds; nor to any charitable donation whatsoever, which by the direction of the donor thereof, or by the lawful rules of any charitable institution whatsoever, may be wholly or in part expended in and about the charitable purposes for which the same may have been given, at the discretion of the governors, directors, managers, or the trustee or trustees of such charitable institution at any time whatsoever.

ing memorials to be allowed.

Not to extend to any donation not secured upon lands, nor to charitable institutions.

XI. And be it further enacted, that nothing in this act shall be construed to extend to any hospital, school, or other charitable institution whatsoever, which shall have been founded, improved, or regulated by or under the authority of the king's most excellent majesty, or any of his royal predecessors, or of any special act of parliament thereunto particu-

Act not to extend to any royal foundations, nor to certain institutions.

52 Geo. III. c. 102.

larly relating; nor to any charitable donation under the superintendence of any such hospital, school, or institution, nor to the governors of the corporation of the charity for the relief of poor widows and children of clergymen, nor to any friendly society, the rules whereof shall have been confirmed according to the provisions of the act or acts for the encouragement and relief of friendly societies; nor to either of the universities of *Oxford* or *Cambridge*, nor to any college or hall thereto belonging, or to any charitable bequest, devise, gift, or foundation whatsoever belonging thereto, or under the control, direction, superintendence, or management of the said universities, or either of them, or any college or hall therein respectively; nor to the *Radcliffe* infirmary within the university of *Oxford*; nor to the colleges of *Westminster*, *Eton*, or *Winchester*, or any of them; nor to any cathedral or collegiate church within *England* and *Wales*; nor to the Charter-house; nor to the corporation of the Trinity-house of *Deptford Strond*; nor to any funds applicable to charitable purposes for the benefit of any persons of the Jewish nation.

Nor to charitable institutions of Quakers.

XII. Provided always, that nothing in this act contained shall extend to any charitable foundation or donation which shall have been or shall be given to and for the benefit of any person or persons of the society of people called *Quakers*, and which shall be under the superintendence and control of persons of that persuasion.

Nor to charitable foundations, the accounts of which are directed to be passed in the court of chancery, &c.

XIII. Provided always, and be it further enacted, that nothing in this act contained shall extend to any charity or charitable donation or foundation, the accounts of the income and expenditure whereof shall have been directed to be annually passed in the high court of chancery, nor to any charity or charitable donation or foundation, the annual gross income whereof shall not exceed forty shillings, and of which the trustee or trustees, feoffee or feoffees, possessor or possessors, some or one of them, shall within six months after the passing of this act deposit in the hands of the minister of the parish wherein any of the objects of such charity, charitable donation, or foundation shall be, a written memorial or statement in like form as in the schedule hereunto annexed is contained, and which by such minister shall be forthwith deposited in the parish chest.

Divers charities may be stated in the memorial.

XIV. And be it further enacted, that where any body corporate, guild, or fraternity, shall be intrusted with the possession or distribution of divers charities or charitable donations or foundations, or of the rents and profits thereof, that in such cases all such charities, charitable donations, and foundations may be registered and stated in one and the same memorial.

Saving clause.

XV. Saving always to the king's most excellent majesty, and to all other persons, such power of superintending and

regulating charities and charitable establishments, and the property and funds thereof, as they respectively had before the making of this act. 52 Geo. III. c. 102.

SCHEDULE to which this Act refers.

A memorial or statement in pursuance of an act for the registering and securing of charitable donations; whereby it is declared by the undersigned [*state the name or names of the persons who sign the memorial or statement*] that the real or personal estate [*state this as the case may be*] of the [*state the title or appellation of the charity or charitable donation*] consists of [*state this as the case may be; and if real estate, whether it be in lands, tenements, or hereditaments, and of what tenure, and where the same are situate, or whether of any charge or incumbrance on any lands, tenements, or hereditaments, and where situate; and if personal estate, describe the nature of it, and how secured*] and the gross annual income arising therefrom amounts to [*state the sum*] and the objects of which charity or charitable foundation are [*state the general or particular objects of the charity*] and which charity or charitable foundation was, according to the best of my [*or*, our, *as the case may be*] knowledge and belief, founded by [*state by whom; and if benefited, increased, or secured by any other person, state the same and by whom*] and the deeds, wills, and other instruments [*state this as the case may be; and if no deeds, wills, or other instruments exist, state the same*] are, to the best of my [*or*, our, *as the case may be*] knowledge and belief, in the custody, possession, or control [*state this as the case may*] of [*state the name of the body corporate or natural person*] and the trustees, feoffees, or possessors [*state this as the case may be*] of the said real and personal estate [*state this as the case may be*] are, to the best of my [*or*, our, *as the case may be*] knowledge and belief [*state the name of the body corporate or natural person, as the case may be*].

(Signed) *A. B.*
C. D.
E. F.

Trustee or trustees, feoffees, possessor or possessors of the real or personal estate [*as the case may be*] of the charity or charitable donation hereby memorialized and registered.

58 Geo. III. c. 91, 10th June, 1818.

58 Geo. III. c. 91. *An Act for appointing Commissioners to inquire concerning Charities in England, for the Education of the Poor (f).*

59 Geo. III. c. 81, 6th July, 1819.

59 Geo. III. c. 81. *An Act to amend an Act of the last Session of Parliament for appointing Commissioners to inquire concerning Charities in England for the Education of the Poor, and to extend the powers thereof to the Charities in England and Wales, to continue in force until the 1st day of August, 1823, and from thence until the then next Session of Parliament (g).*

Applications to Courts of Equity respecting Charities, 59 George III. c. 91, 12th July, 1819.

An Act for giving additional Facilities in applications to Courts of Equity, regarding the Management of Estates or Funds belonging to Charities.

59 Geo. III. c. 91. 58 Geo. III. c. 91. 59 Geo. III. c. 81.

Whereas an act was passed in the last session of parliament, intituled *An Act for appointing commissioners to inquire concerning Charities in England for the education of the Poor;* and certain commissioners were appointed for the execution of the said act: and whereas an act hath passed in the present session of parliament, intituled *An Act to amend an Act of the last session of Parliament for appointing commissioners to inquire concerning Charities in England, for the education of the Poor, and to extend the powers thereof to other Charities in England and Wales*, whereby the numbers and powers of the commissioners were extended: and whereas it is expedient that additional facilities should be afforded for applications to the courts of equity regarding the management of estates or funds appropriated to charitable purposes; be it therefore enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by authority of the same, that whenever, upon any examination or investigation taken or had by and before the commissioners appointed or to be appointed under the authority of the before mentioned acts, any case shall arise or

When it shall appear that the directions of a court of equity are requisite, commissioners may

(f) See *ante*, p. 305. (g) *Ante*, pp. 307, 308.

happen in which it shall appear to the said commissioners that the directions or orders of a court of equity are requisite for the remedying of any neglect, breach of trust, fraud, abuse, or misconduct in the management of any trust created for any charitable purposes as aforesaid, or of the estates or funds thereto belonging, or for the regulating the administration of any such trust, or of the estates or funds thereof, it shall and may be lawful for the said commissioners, or any five or more of them, if they shall think fit, to certify the particulars of such case in writing under their hands to his majesty's attorney general, and thereupon it shall be lawful for his majesty's attorney general, if he shall so think fit, either by a summary application in the nature of a petition, or by information, as the case may require, to apply to or commence a suit in his majesty's high court of chancery, or to or in his majesty's court of exchequer sitting as a court of equity, stating and setting forth the neglect, breach of trust, fraud, abuse, or misconduct, or other cause of complaint or application, and praying such relief as the nature of the case may require; and when such petition or suit is instituted in the said court of exchequer, it shall be lawful for that court to proceed in the hearing and deciding of the same, according to the due course of the said court; and any order or decree of the same court in such proceeding shall be final and conclusive to all intents and purposes whatsoever, unless the party or parties who shall think himself or themselves aggrieved thereby shall within one year after the time when such order or decree shall have been made and entered by the proper officer, prefer an appeal from such order or decree to the house of lords; and when such petition or suit is presented or commenced in the said high court of chancery, it shall and may be lawful to and for the lord chancellor, lord keeper, or lords commissioners for the custody of the great seal, and they are hereby required, to order and direct such petition or suit to be heard and determined either before the master of the rolls or vice chancellor, as to the said lord chancellor, lord keeper, or lords commissioners shall seem meet; and thereupon the master of the rolls or vice chancellor shall proceed to hear and to rehear, if to him it shall appear necessary, and to determine the same; and all decrees, orders, and acts of the master of the rolls and vice chancellor made and done therein, shall be deemed and taken to be respectively decrees, orders, and acts of the said court of chancery, and be executed accordingly, subject nevertheless in every case to be reversed, discharged, or altered by the lord chancellor, lord keeper, or lords commissioners for the custody of the great seal for the time being; and no such decree or order shall be enrolled, until the same be signed by the lord chan-

59 Geo. III. c. 91.

certify the particulars to the attorney general who may apply to commence a suit in the court of chancery or court of exchequer, &c.

59 Geo. III. c. 91.

cellor, lord keeper, or lords commissioners of the great seal for the time being (*g*).

No appeal from the lord chancellor to the house of lords.

II. And be it further enacted, that when any appeal shall be made to the lord chancellor, lord keeper, or lords commissioners of the great seal, from any order or decree of the master of the rolls or vice chancellor, made in any matter aforesaid, the decree or order which shall be made on such appeal by the lord chancellor, lord keeper, or lords commissioners of the great seal, shall be final and conclusive, to all intents and purposes whatsoever, and no appeal from such decree or order of the lord chancellor, lord keeper, or lords commissioners for the custody of the great seal, to the house of lords shall be allowed.

III. Exempted all proceedings from stamp duty. See *ante*, p. 841, n. (*d*).

IV. Persons refusing to appear before commissioners, or to produce deeds, or refusing to answer questions upon oath, were liable to be fined by the court of king's bench or exchequer. The provision is similar to the 11 sect. of 5 & 6 Will. IV. c. 71, *post*.

V. Where regulations are insufficient for a due administration of the funds of any institution, the trustees may apply to chancery for relief. This section of the act is stated *verbatim*, *ante*, pp. 496, 497.

Exchange of Charity Estates, 1 & 2 George IV. c. 92, 10th July, 1821.

An Act to authorise the Exchange of Lands, Tenements, or Hereditaments, subject to Trusts for Charitable Purposes, for other Lands, Tenements, or Hereditaments.

1 & 2 Geo. IV. c. 92.

Whereas lands, tenements, or hereditaments, subjected to trusts for charitable purposes, may be in some cases exchanged for other lands, tenements, or hereditaments, so as to benefit the objects of the charity: may it therefore please your majesty that it may be enacted, and be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and after the passing of this act it shall and may be lawful for any person or persons, body politic or corporate, in whom any lands, tenements, or hereditaments shall be vested, subject to any trust for any charitable purpose, to grant and convey to any person or persons,

Persons in whom lands, &c. are invested, may exchange premises.

(*g*) See 2 Will. IV. c. 57, 5 & 6 Will. IV. c. 71, s. 18, *post*.

body politic or corporate, and to his, her, or their heirs, successors, and assigns, or otherwise, as he, she, or they shall direct or appoint, any such lands, tenements, or hereditaments, in exchange for any other lands, tenements, or hereditaments, under and according to the several restrictions, declarations, and provisions hereinafter expressed, and not otherwise.

Application to be made to the bishop of the diocese, who may issue a commission to ascertain whether an exchange will be beneficial to the charity.

II. And be it further enacted, that whenever it shall be thought advisable by the trustees or trustee of any lands, tenements, or hereditaments, subject to any trust for any charitable purpose, to exchange the same, or any parts or part thereof, for any other lands, tenements, or hereditaments, application shall be made to the bishop of the diocese in which any such lands, tenements, or hereditaments, subject to any trust for charitable purposes, and so proposed to be exchanged, shall be situate, stating the objects of the charity, the manner in which such charity lands, tenements, or hereditaments are become vested in such trustees or trustee, and for what reasons it may be fit and proper that any such exchange should be made, and what benefit will be derived to the objects of the charity by means of such exchange, which statement shall be verified on oath before one of his majesty's justices of the peace for the county, riding, division, or place where such lands shall be situate; and thereupon it shall be lawful for such bishop to direct such inquiries to be made as he may think proper, and to require such information to be given to him as he may think necessary, previous to his issuing such commission, as hereinafter mentioned; and in case such bishop shall be satisfied that reasonable ground has been laid before him to warrant his issuing such commission, then and in such case such bishop shall issue a commission, under his episcopal seal, directed to four or more fit and proper persons, two of whom at the least shall be beneficed clergymen, and one of whom shall be a barrister at law of at least five years' standing, and by such commission the commissioners therein named, or any three of them, one of whom shall be a beneficed clergyman and one such barrister as aforesaid, shall be authorised and required to inquire whether such proposed exchange will be beneficial to the objects of the trust, to which the charity lands, tenements, or hereditaments so proposed to be exchanged shall be subject, and for what reason or reasons such exchange will be beneficial to the charity; and for the purpose of such inquiry, such commissioners shall examine upon oath (which oath they are hereby empowered to administer) all persons who may be brought before them for that purpose, and shall require the parties applying for such exchange to bring before them any other persons to be examined upon

Of whom the commission shall consist.

Commissioners to examine on oath, and may require production of deeds, and direct surveys to

1 & 2 Geo. IV. c. 99.

oath touching any matters which such commissioners may deem necessary for their information; and such commissioners shall also require all deeds, papers, and writings, which they may deem necessary for their information, to be also laid before them, and shall direct such surveys, maps, and plans to be made of the lands proposed to be given and taken in exchange, as they may think proper; and shall cause such lands, tenements, and hereditaments respectively, and the timber and trees on such lands respectively, and rights of common, and all other rights belonging thereto, to be valued, so as clearly to ascertain whether the proposed exchange will be permanently beneficial to the charity or not, and if permanently beneficial, for what reason it will be so beneficial, and whether such exchange is proposed for the convenience of the charity, or for the convenience of any other person or persons, body politic or corporate, and whether the terms upon which the exchange is proposed to be made are the best which can reasonably be obtained for the benefit of the charity; and such commissioners shall also inquire into the title to the lands, tenements, or hereditaments proposed to be given in exchange for the benefit of such charity, so as to enable the bishop, on the return of such commission, to judge of the propriety of allowing such exchange to take place; and such commissioners shall thereupon certify to the bishop the several matters which shall be made to appear to them, together with the surveys and other evidence laid before them, closed up, under their hands and seals, which shall be deposited with the registrar of the diocese.

be made, and certify to the bishop the matters that shall arise.

Commissioners to take the following oath.

III. And be it further enacted, that before such commissioners shall proceed to execute such commission, they shall respectively take the following oath:

"I *A. B.* one of the commissioners named in a commission [*describing the commission,*] do swear, that I will faithfully do and execute all the matters by the said commission required to be done by me, and a true report make to the best of my ability, as by such commission required.

"So help me God."

Which oath shall be administered by one of the said commissioners, to any other or others of them, and shall be certified to the bishop, together with the other proceedings under such commission.

The bishop may lay the proceedings of the commissioners before counsel.

IV. And be it further enacted, that upon the return of such commission it shall be lawful for the bishop to examine the proceedings under the same, and, if he shall see fit, to direct the same to be laid before some counsel learned in the law for his opinion and advice thereupon, and also to direct the title to the lands proposed to be given in exchange to the charity to be examined in such manner as he shall think fit;

and if he shall think fit, to cause the same to be laid before counsel learned in the law for his opinion thereon; and in case the said bishop shall not be satisfied with the return made by such commissioners, it shall be lawful for him to issue a new commission or new commissions, directed to the same or other commissioners, to the end that he may be fully satisfied of the propriety of such proposed exchange; and such new commission or commissions shall be executed and returned, and the return or returns thereto deposited with the registrar of the diocese, as before directed with respect to the first commission; and if the said bishop shall be satisfied, upon the return of the commission or commissions so to be issued by him, or by such other and further information as he shall obtain as aforesaid, that such proposed exchange is proper and beneficial to the charity, it shall be thereupon lawful for him to signify his approbation of such exchange, by signing and sealing with his episcopal seal two parts of the deed of bargain and sale hereinafter mentioned; and it shall be lawful for the trustees or trustee of the charity lands, tenements, or hereditaments proposed to be exchanged, by deed of bargain and sale, enrolled in the high court of chancery within six calendar months after the date thereof, to convey the lands, tenements, or hereditaments to be given by them in exchange, to the person or persons, bodies politic or corporate, to whom the same shall be directed to be conveyed; and by the same deed the lands, tenements, or hereditaments, proposed to be given to the charity in exchange, shall also be conveyed to the uses of such charity, and such deed shall be acknowledged by the person or persons making the conveyance of such lands, tenements, or hereditaments, to the uses of such charity, for the purpose of enrolment; and two parts of such deed shall be prepared and executed, and a memorandum of the enrolment shall be indorsed on each part; and both parts of such deed, after the same shall have been enrolled as aforesaid, shall be produced to the bishop, and a transcript of such deed, and of the memorandum of enrolment, shall be entered in the registry of the diocese; and the bishop shall thereupon, by writing under his hand, indorsed on each part of such deed, authorise the delivery of possession, according to the terms of such deed, of the lands before belonging to the charity, and so conveyed in exchange; and the delivery of possession to the trustees or trustee of the charity, of the lands, tenements, or hereditaments so conveyed to them in exchange, and the execution of both parts of such deed by the several parties thereto, and the signing of such authority for delivery of possession, shall be attested by two or more credible witnesses, which attestation or attestations shall be

A new commission may be issued.

Approbation to be signified by signing and sealing.

Conveyance to be made in manner herein mentioned.

Deeds when enrolled to be produced to the bishop, and a transcript thereof entered in the registry of the diocese.

1 & 2 Geo. IV. c. 32.

indorsed on both parts of such deed; and the attestation of the execution of such deed by the trustees or trustee of the charity lands, tenements, or hereditaments thereby conveyed, shall express that both parts of such deed were signed by the bishop before the execution thereof by such trustees or trustee; and a transcript of such authority for delivery of possession, and of such several attestations as aforesaid, shall be entered in the registry of the diocese, and one part of such deed shall remain with such trustees or trustee, for the benefit of the charity, and the other part shall be delivered to the person or persons, body politic or corporate, to whose use the charity lands, tenements, or hereditaments shall be thereby conveyed in exchange.

Before issuing commission, three months' notice to be given in newspapers, &c. stating particulars, &c.

V. Provided also, and be it further enacted, that before any such commission shall issue to make inquiry touching any exchange intended to be made under the provisions of this act, three months' previous notice shall be given of the intention to propose such exchange, by inserting the particulars, extent, and situation, and the tenure of the lands, tenements, or hereditaments respectively proposed to be given and taken in exchange, for three successive weeks in some one and the same newspaper generally circulating in that part of the country where the lands, tenements, or hereditaments proposed to be exchanged shall be situated; and also by affixing such notice in writing on a conspicuous part of the door of the church or chapel of each parish or chapelry wherein such lands, tenements, or hereditaments, or any part thereof, shall be situated, on three successive Sundays whereon divine service shall be performed, and shortly before the commencement of such service in each church or chapel.

Vacancies of trustees to be filled up prior to any application for an exchange, unless when there are six or more trustees.

VI. And whereas, in some cases where there were originally two or more trustees of charity lands, tenements, or hereditaments, proposed to be exchanged under the authority of this act, the number of trustees may have been reduced by death or otherwise; be it further enacted, that in such cases the vacancies of trustees shall be filled up in the usual manner, prior to any application for an exchange pursuant to this act, except in such cases in which the number of trustees living and capable of acting shall be six or more, in which cases the majority in number of trustees living and capable of acting, shall signify their consent to any proposed exchange in writing, by signing the application to the bishop to authorise such exchange as aforesaid; and when the original trustees shall have been fewer in number than six, and more than three, than the consent of not less than four of such trustees shall be so signified to the bishop; and if the original trustees shall have been only three or two, then the consent of all the trustees shall be signified by all of them; or if there shall

Number of trustees necessary to give consent.

have been originally only one trustee, then the consent of the sole trustee for the time being shall be so signified; and if any body politic or corporate shall be a trustee for any such charity lands, tenements, or hereditaments, then such consent shall be signified under the seal of the corporation, whether a corporation aggregate or sole, having a corporate seal, and such signatures, and the affixing of such seal respectively, shall be attested by two or more credible witness or witnesses.

In cases where there are no trustees, the bishop may appoint them in cases of exchange.

VII. And whereas in some cases it may not appear in whom lands, tenements, or hereditaments subject to charitable purposes may be vested, and there may be therefore no person capable of acting touching any such exchange as aforesaid, on behalf of the charity; be it further enacted, that in all such cases it shall be lawful for the bishop of the diocese in which such lands, tenements, or hereditaments shall be situate, upon sufficient proof of the fact, by instrument in writing under his hand and seal, to nominate proper persons to act as trustees on behalf of the charity, for the purposes of such exchange, before any other proceedings shall be had touching such exchange; which trust the person so nominated shall accept, by executing such instrument, before they shall act in such trust; and thereupon it shall be lawful for such trustees to do all things necessary for the purpose of such exchange, as if the lands, tenements, and hereditaments subject to such charitable purposes had been duly vested in them for such purposes, and to convey the charity lands proposed to be exchanged under the authority of this act: provided always, that if it shall at any time afterwards appear in whom such lands or hereditaments were actually vested at the time of such exchange, it shall be lawful for the person or persons, body politic or corporate, in whom the same shall be then vested by means of such exchange, to obtain, at his, her, or their own expense, a confirmation thereof by conveyance from the person or persons, or their heirs, in whom it shall appear the same were so vested at the time of such exchange; but the defect of title of the trustees so to be nominated by the bishop as aforesaid, shall not prejudice the title to the lands, tenements, or hereditaments received in exchange in trust for such charitable purposes as aforesaid, but the same shall be held and enjoyed for such charitable purposes, notwithstanding the lands, tenements, or hereditaments originally subject to such charitable purposes, and so given in exchange, were not vested, except by the authority of this act, in the persons who may have conveyed the same in exchange under the authority of this act.

Confirmation of conveyance.

Exchanges may be effected though trustees may be

VIII. And whereas doubts may arise whether under the provisions of this act an exchange might be legally effected where any trustee or trustees of charity lands, proposed to be

1 & 2 Geo. IV. c. 92.

given in exchange, should also be the proprietor or proprietors of the lands for which such charity lands should be so proposed to be given in exchange; be it therefore enacted, that under and according to the several restrictions, declarations, and provisions hereinbefore expressed, and subject thereto, but not otherwise, it shall and may be lawful for any trustee or trustees of any lands, tenements, or hereditaments vested in him, her, or them, either alone or jointly with any other trustee or trustees for any charitable purpose or purposes, to convey or join in conveying, as the case may be, any such trust lands, tenements, or hereditaments, in lieu of and in exchange for any other lands, tenements, or hereditaments of which he, she, or they shall be seised in fee, to and for his, her, or their own use and benefit: provided always, that in every such case the bishop to whom application shall be made for any such exchange, shall, upon such application, and before any other proceedings touching such exchange, nominate and appoint some proper person or persons, having no interest in such exchange, to act as trustee or trustees on the behalf of the said charity, in the matter of such exchange, in the place and stead of the trustee or trustees who by reason of such interest as aforesaid shall be disqualified to act therein; and the concurrence of the person or persons, so to be appointed to act as temporary trustee or trustees as aforesaid, shall be necessary in all subsequent proceedings relating to such exchange.

proprietors of the lands to be given in exchange.

But the bishop, in such cases, shall appoint trustees who have no interest in the lands.

Eviction in case of defective title.

IX. Provided always, and be it further enacted, that in case the title of any person or persons, body politic or corporate, by whom any lands, tenements, or hereditaments shall be attempted to be conveyed in exchange for any charity lands, tenements, or hereditaments, shall at any time appear to be in any manner defective, so that such lands, tenements, or hereditaments shall in the whole or in part be recovered from the trustees or trustee, body politic or corporate, in whom the same shall have been vested or attempted to be vested in exchange under the authority of this act, or shall be in any manner charged or incumbered, then and in such case the trustees or trustee, body politic or corporate, in whom such lands, tenements, and hereditaments, or any part thereof, ought to have been vested indefeasibly for charitable purposes as aforesaid, shall enter on the original charity lands, tenements, or hereditaments conveyed in exchange as aforesaid, and hold the same according to the original right before the exchange, for the benefit of the charity, in case the lands, tenements, or hereditaments intended to have been vested by way of exchange for the purposes of the charity shall be wholly evicted, or in case the same shall be partially evicted, or in any manner incumbered, then to hold the same for the

purpose of indemnifying the charity against the consequences of any such partial eviction or any such incumbrance, and until full satisfaction shall have been made to the charity, for any defect of title in the lands, tenements, or hereditaments conveyed in exchange for the original charity lands, tenements, or hereditaments as aforesaid, and all costs, charges, and expenses incurred by the charity in consequence thereof.

Expense attending exchanges how to be paid.

X. And be it further enacted, that no part of the expenses attending any exchange to be made in pursuance of this act, shall be borne by or paid out of the funds of any charity, unless it shall be made appear to the bishop of the diocese, upon application for such exchange as aforesaid, that such exchange is solely intended for the benefit of such charity, and not for any other purpose, and is in respect of such convenience advantageous to the charity, notwithstanding any expense which may be incurred in effecting the same; and then so much of such expenses only shall be borne by and discharged out of the funds of such charity as such bishop shall find to be just and reasonable, and shall, by instrument under his hand, allow and declare to be, in his opinion, an expense incurred for the benefit of the charity, and such as ought to be discharged out of the funds of such charity.

Exempt jurisdiction not to affect proceedings of the diocesan.

XI. And whereas charity lands, tenements, or hereditaments may be within some peculiar or exempt jurisdiction; be it further enacted, that in such case the application for an exchange under the authority of this act shall be made to the bishop of the diocese within which the charity lands, tenements, or hereditaments proposed to be exchanged shall be situate, and not to any other authority claiming such peculiar or exempt jurisdiction; and the bishop of such diocese shall proceed in the same manner, in such case, as if such charity lands, tenements, or hereditaments were to all intents and purposes within his jurisdiction as diocesan; and in case any such charity lands, tenements, or hereditaments shall be within two or more dioceses, then and in such case application shall be made to the several bishops of such several dioceses, to direct before which of such bishops the proceedings touching any such exchange shall be had, and such bishops shall accordingly direct before which of such bishops such proceedings shall be had; and thereupon such proceedings shall be had before such bishop in the same manner as such proceedings might have been had if all such charity lands, tenements, or hereditaments had been within the diocese of such bishop (*h*).

(*h*) The stat. 4 & 5 Will. IV. c. 30, for exchanging lands in common fields extends to trustees for charitable uses. See Shelford's Real Prop. Statutes, 412—430, 3rd ed.

5 GEORGE IV. c. 58, 9th June, 1824.

5 Geo. IV. c. 58. ***An Act to continue for Four Years, and from thence until the end of the then next Session of Parliament, the Powers of the Commissioners for inquiring concerning Charities in England and Wales*** (i).

ACT FOR REMEDYING DEFECTS IN ASSURANCES TO CHARITABLE USES, 9 GEORGE IV. c. 85, 25th July, 1828.

An Act for remedying a Defect in the Titles of Lands purchased for Charitable Purposes.

9 Geo. IV. c. 85. WHEREAS by an act passed in the ninth year of the reign of his late majesty King George the Second, and intituled 9 Geo. II. c. 36. *An Act to restrain the Disposition of Lands whereby the same become unalienable*, it was amongst other things enacted, that after the twenty-fourth day of June, one thousand seven hundred and thirty-six, no manors, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal, whatsoever, should be given, granted, aliened, limited, released, transferred, assigned, or appointed, or anyways conveyed or settled to or upon any person or persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, or anyways charged or incumbered by any person or persons whatsoever, in trust or for the benefit of any charitable uses whatsoever, unless such gift, conveyance, appointment, or settlement of any such lands, tenements or hereditaments, were made by deed indented, sealed and delivered in the presence of two or more credible witnesses, twelve calendar months at the least before the death of such donor or grantor (including the days of the execution and death) and were enrolled in his majesty's high court of chancery within six calendar months next after the execution thereof, and unless the same were made to take effect in possession, for the charitable use intended, immediately from the making thereof, and were without any power of revocation, reservation, trust, condition, limitation, clause, or agreement whatsoever, for the benefit of the donor or grantor, or of any person or persons claiming under him; but it was thereby provided, that nothing thereinbefore mentioned, relating to the sealing and delivery of any deed or deeds twelve calendar months at least before the death of the grantor, should extend or be construed to extend to any purchase of any estate or interest in lands,

(i) *Ante*, p. 309.

tenements, or hereditaments, to be made really and *bonâ fide* for a full and valuable consideration actually paid at or before the making such conveyance, without fraud or collusion; and it was thereby enacted, that all gifts, grants, appointments, assurances, transfers, and settlements whatsoever, of any lands, tenements, or other hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any lands, tenements, or hereditaments, to or in trust for any charitable uses whatsoever, which should at any time after the said twenty-fourth day of June, one thousand seven hundred and thirty-six be made in any other manner or form than by the said act was directed and appointed, should be absolutely, and to all intents and purposes, null and void: and whereas the said provision contained in the said recited act, in relation to the purchase of any estate or interest in lands, tenements, or hereditaments, for a full and valuable consideration, was only intended to prevent such purchases from being avoided by reason of the death of the grantor within twelve calendar months after the sealing and delivery of the deed or deeds relating thereto (*j*): and whereas it has notwithstanding been generally apprehended, that the said last mentioned provision was intended wholly to exempt such purchases from the operation of the said act, and in consequence thereof the formalities by the said act prescribed, in relation to the conveyance of hereditaments to charitable uses, have in divers instances been omitted on purchases for a full and valuable consideration, and by reason of such omission the title to such hereditaments may be considered defective: and whereas it is expedient that provision should be made for remedying such defect in manner hereinafter mentioned: may it therefore please your majesty that it may be enacted, and be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that where any lands, tenements, or hereditaments, or any estate or interest therein, have or has been purchased for a full and valuable consideration, in trust or for the benefit of any charitable uses whatsoever, and such full and valuable consideration has been actually paid for the same, every deed or other assurance already made for the purpose of conveying or assuring such lands, tenements, or hereditaments, estate or interest as aforesaid, in trust or for the benefit of such charitable uses (if made to take effect in possession, for the charitable use intended, immediately from the making thereof, and without any power of revocation, reservation, trust, condition, limitation, clause, or agreement whatsoever, for the benefit of the

9 Geo. IV. c. 85.

Deeds relating to purchase of lands for charitable purposes to be valid, although the formalities prescribed by the recited act have not been duly performed.

(*j*) *Ante*, pp. 119, 131—137.

9 Geo. IV. c. 85.

grantor, or of any person or persons claiming under him,) shall be as good and valid, and of the same effect, both for establishing derivative titles, and in all other respects, as if the several formalities by the said act prescribed had been duly observed and performed.

Act not to extend to deeds avoided by suits at law.

II. Provided always, and be it further enacted, that nothing in this act contained shall extend to give effect to any deed or other assurance heretofore made, so far as the same has been already avoided by suit at law or in equity, or by any other legal or equitable means whatsoever, or to affect or prejudice any suit at law or in equity actually commenced for avoiding any such deed or other assurance, or for defeating the charitable uses in trust or for the benefit of which such deed or other assurance may have been made.

Not to dispense with prescribed formalities.

III. Provided also, and be it further enacted, that nothing herein contained shall be construed to dispense with any of the said several formalities prescribed by the said recited act, in relation to any deed or other assurance which shall be made after the passing of this present act.

10 George IV. c. 57, 19th June, 1829.

10 Geo. IV. c. 57.

An Act to continue until the First Day of July, 1830, the Powers of the Commissioners for inquiring concerning Charities in England and Wales (*k*).

1 & 2 William IV. c. 34, 15th October, 1831.

1 & 2 Will. IV. c. 34.

An Act for appointing Commissioners to continue the Inquiries concerning Charities in England and Wales for Two Years, and from thence to the end of the then next Session of Parliament (*l*).

Augmentation of Small Livings, 1 & 2 William IV. c. 45, 15th October, 1831.

An Act to extend the Provisions of an Act passed in the Twenty-ninth Year of the Reign of His Majesty King Charles the Second, intituled An Act for confirming and perpetuating Augmentations made by Ecclesiastical Persons to small Vicarages and Curacies; and for other Purposes (*m*).

1 & 2 Will. IV. c. 45.

Whereas by an act passed in the twenty-ninth year of

(*k*) *Ante*, p. 309.
(*l*) *Ante*, pp. 309, 310.
(*m*) *Ante*, pp. 51, 52.

the reign of his late majesty King Charles the Second, intituled *An Act for confirming and perpetuating Augmentations made by Ecclesiastical Persons to small Vicarages and Curacies*, it was amongst other things enacted, that all and every augmentation, of what nature soever, granted, reserved, or agreed to be made payable, or intended to be granted, reserved, or made payable, since the first day of June, in the twelfth year of his said majesty's reign, or which should at any time thereafter be granted, reserved, or made payable to any vicar or curate, or reserved by way of increase of rent to the lessors, but intended to be to or for the use or benefit of any vicar or curate, by any archbishop, bishop, dean, provost, dean and chapter, archdeacon, prebendary, or other ecclesiastical corporation, person or persons whatsoever, so making the said reservation out of any rectory impropriate or portion of tithes belonging to any archbishop, bishop, dean, provost, dean and chapter, or other ecclesiastical corporation, person or persons, should be deemed and adjudged to continue, and be and should for ever thereafter continue and remain, as well during the continuance of the estate or term upon which the said augmentations were granted, reserved, or agreed to be made payable, as afterwards, in whose hands soever the said rectories or portion of tithes should be or come, which rectories or portions of tithes should be chargeable therewith, whether the same should be reserved again or not; and the said vicars and curates respectively were thereby adjudged to be in the actual possession thereof for the use of themselves and their successors, and the same should for ever thereafter be taken, received and enjoyed by the said vicars and curates, and their successors, as well during the continuance of the term or estate upon which the said augmentations were granted, reserved, or agreed to be made payable, as afterwards; and the said vicars and curates should have remedy for the same, either by distress upon the rectories impropriate or portions of tithes charged therewith, or by action of debt against that person who ought to have paid the same, his executors or administrators, any disability in the person or persons, bodies politic or corporate so granting, or any disability or incapacity in the vicars or curates to whom or to or for whose use or benefit the same were granted or intended to be granted, the statute of mortmain, or any other law, custom, or other matter or thing whatsoever, to the contrary notwithstanding (*n*); provided always, that no future augmentation should be confirmed by virtue of the said act which should exceed one moiety of the clear yearly value

1 & 2 Will. IV. c. 45.

29 Car. II. c. 8.

(*n*) 29 Car. II. c. 8, s. 2.

1 & 2 Will. IV. c. 45.

above all reprises of the rectory impropriate out of which the same should be granted or reserved (*o*); and it was thereby also enacted, that if any question should thereafter arise concerning the validity of such grants, or any other matter or thing in that act mentioned and contained, such favourable constructions, and such remedy, if need be, should be had and made for the benefit of the vicars and curates as theretofore had been had and made or might be had for other charitable uses upon the statutes for charitable uses (*p*): and whereas it is expedient that the powers and provisions of the said act should be amended and enlarged; be it therefore enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that the said recited provision by which the amount of any augmentation is restricted and limited to one moiety of the clear yearly value above all reprises of the rectory impropriate out of which the same should be granted and reserved, shall, so far as relates to any augmentation which may be granted after the passing of this act, be and the same is hereby repealed.

Provision in recited act limiting any augmentation repealed.

Explaining doubts as to portion of tithes, &c.

II. And whereas doubts may arise by reason of the mention of portion of tithes in the said recited act; be it enacted, that the provisions of the said recited act shall extend to any augmentation to be made out of tithes, although the same may not be a portion of tithes; and further, that it shall be lawful, under the power given by the said recited act, to grant, reserve, or make payable any such augmentation as aforesaid to the incumbent of any church or chapel within the parish or place in which the rectory impropriate shall lie, or in which the tithes or portion of tithes shall arise (as the case may be), whether such incumbent shall be a vicar or curate, or otherwise: provided also, that no such augmentation shall be made payable to any other person whomsoever.

Recited act to extend to augmentations by colleges and hospitals.

III. And be it further enacted, that in every case in which any augmentation shall at any time hereafter be granted, reserved, or made payable to the incumbent of any church or chapel, or reserved by way of increase of rent to the lessors, but intended to be to or for the use or benefit of any incumbent, by the master and fellows of any college, or the master or guardian of any hospital so making the said grant or reservation out of any rectory impropriate, or tithes, or portion of tithes, belonging to the master and fellows of such college, or the master or guardian of such hospital, all the provisions hereinbefore recited and set forth, except the pro-

(*o*) 29 Car. II. c. 8, s. 3.
(*p*) Id. s. 7; see *ante*, pp. 245—247, 514—517.

vision hereinbefore repealed, shall apply to such case in the same manner as if the same provisions, except as aforesaid (with such alterations therein as the difference between the cases would require), were herein expressly set forth and enacted with reference thereto: provided always, that every such augmentation shall be made to the incumbent of some church or chapel within the parish or place in which the rectory impropriate shall lie, or in which the tithes or portion of tithes shall arise (as the case may be).

The same statute to extend to augmentations made by spiritual persons, colleges, and hospitals, out of any hereditaments, to any church or chapel being in their patronage.

IV. And be it further enacted, that in every case in which any augmentation shall at any time hereafter be granted, reserved, or made payable to the incumbent of any church or chapel being in the patronage of the grantor or grantors, or lessor or lessors, or be reserved by way of increase of rent to the lessor or lessors, but intended to be to or for the use or benefit of any such incumbent, by any archbishop, bishop, dean, dean and chapter, archdeacon, prebendary, or other ecclesiastical corporation, person or persons whatsoever, or the master and fellows of any college, or the master or guardian of any hospital so making the said grant or reservation out of any lands, tenements, or other hereditaments belonging to such archbishop, bishop, dean, dean and chapter, archdeacon, prebendary, or other ecclesiastical corporation, person or persons whatsoever, or the master and fellows of such college, or the master or guardian of such hospital, all the provisions hereinbefore recited and set forth (except the provision hereinbefore repealed) shall apply to such case in the same manner as if the same provisions, except as aforesaid (with such alterations therein as the difference between the cases would require), were herein expressly set forth and enacted with reference thereto.

All such augmentations to be in the form of annual rents.

V. Provided also, and be it further enacted and declared, that every augmentation which at any time hereafter shall be granted, reserved, or made payable, either under the power given by the said recited act, or under either of the powers hereinbefore contained, shall be in the form of an annual rent, and that the provisions of the said recited act, and the provisions hereinbefore contained, shall not apply to any other kind of augmentation whatsoever to be made after the passing of this act.

Where hereditaments are in lease a part of the reserved rent may be granted as an augmentation.

VI. And be it further enacted and declared, that where any such rectory impropriate, or tithes, or portion of tithes, or any such lands, tenements, or other hereditaments as aforesaid, shall respectively be subject to any lease on which an annual rent shall be reserved or be payable to the person or persons or body politic making the augmentation, it shall be lawful during the continuance of such lease, to exercise the power given by the said recited act, or either of the

1 & 2 Will. IV. c. 45.

powers hereinbefore contained (so far as the same shall apply), by granting to the incumbent of the benefice intended to be augmented a part of the rent which shall be so reserved or made payable as aforesaid, and then and in every such case the same premises shall for ever, as well after the determination of such lease as during the continuance thereof, be chargeable to such incumbent, and his successors, with the augmentation which shall have been so granted to him as aforesaid; and from and after such time as notice of the said grant shall be given to the person or persons entitled in possession under the said lease, and thenceforth during the continuance of the same, such incumbent and his successors shall have all the same powers for enforcing payment of such augmentation as the person or persons or body politic by whom the augmentation shall have been granted might have had in that behalf in case no grant of the same had been made; and after the determination of the said lease, the said incumbent, and his successors, shall have such remedy for enforcing payment of such augmentation as aforesaid, as is provided by the said recited act with respect to augmentations granted, reserved, or made payable under the authority thereof.

Where hereditaments are subject to a lease not reserving a rack-rent, an augmentation may be granted, to take effect on the determination of such lease.

VII. And be it further enacted, that where any such rectory impropriate, or tithes, or portion of tithes, lands, tenements, or other hereditaments as aforesaid, shall be subject to any lease for any term not exceeding twenty-one years or three lives, or (in case of such houses as under the provisions of the act passed in the fourteenth year of the reign of her majesty Queen Elizabeth, intituled *An Act for continuation, explanation, perfecting, and enlarging of divers Statutes*, may lawfully be leased for forty years,) not exceeding forty years, on which lease the most improved rent at the time of making the same shall not have been reserved, it shall be lawful at any time during the continuance of such lease to exercise the power given by the said recited act, or either of the powers hereinbefore contained, by granting out of the said premises an augmentation, to take effect in possession after the expiration, surrender, or other determination of such lease, and then and in every such case the said premises shall, from and after the expiration, surrender, or other determination of the said lease, and for ever thereafter, be chargeable with the said augmentation; and the provisions of the said recited act and of this act respectively, shall in all respects apply to every augmentation which shall be so granted in the same manner as in other cases of augmentations to be granted under the powers of the said recited act or of this act.

Power in

VIII. And whereas it is apprehended that it may be

desirable in many cases to make grants of augmentations in the manner last hereinbefore mentioned, and that such grants would be much discouraged if the augmentation to be granted should necessarily take effect in possession upon a surrender of the lease during which the same had been granted as aforesaid for the purpose of such lease being renewed; be it therefore further enacted, that in any case in which an augmentation shall have been granted to take effect in possession after the expiration, surrender, or other determination of any lease in the manner authorised by the clause last hereinbefore contained, and a renewal of such lease shall take place before the expiration thereof, it shall be lawful in and by the renewed lease to defer the time from which such augmentation is to take effect in possession as aforesaid until any time to be therein specified in that behalf: provided always, that the time to which the augmentation shall be so deferred, shall be some time not exceeding twenty-one years, or (in the case of such houses as by the said act of her majesty Queen Elizabeth may lawfully be leased for forty years,) not exceeding forty years, to be respectively computed from the commencement of the lease during which the augmentation shall have been granted.

Power to defer the commencement of the augmentation upon a renewal of the lease.

IX. Provided always, and be it further enacted, that where any such augmentation as aforesaid shall have become chargeable, under or by virtue of the said recited act or of this act, upon any rectory impropriate, tithes, portion of tithes, lands, tenements, or other hereditaments, if any lease shall afterwards be granted of any part of the same premises separately from the rest thereof, then and in every such case, and from time to time so often as the same shall happen, it shall be lawful for the person or persons granting such lease to provide and agree that any part of such augmentation shall during such lease be paid out of such part of the hereditaments previously charged therewith as shall be comprised in the said lease, and then and in such case, and thenceforth during the lease so to be made as aforesaid, no further or other part of the said augmentation shall be charged on the premises comprised in the said lease than such part of the said augmentation as shall be so agreed to be paid out of the same: provided always, that in every such case the hereditaments which shall be leased in severalty as aforesaid shall be a competent security for such part of the said augmentation as shall be agreed to be paid out of the same, and the remainder of the hereditaments originally charged with the said augmentation shall be a competent security for the residue thereof.

Power to apportion augmentations on future leases.

Restriction on the exercise of the power of apportionment.

X. And whereas by the said recited act it was enacted, that if upon the surrender, expiration, or other determination of any lease wherein such augmentation had been or should

Repeal of so much of recited act as requires an express con-

1 & 2 Will. IV. c. 45.

be granted, any new lease of the premises, or any part thereof, should thereafter be made without express continuance of the said augmentation, every such new lease should be utterly void; be it further enacted, that the said last-mentioned provision, so far as relates to any augmentation which may be granted after the passing of this act, shall be and the same is hereby repealed.

tinuance of the augmentation in new leases.

Ecclesiastical corporations, colleges, &c. holding impropriate rectories or tithes, may annex the same to any church or chapel within the parish in which the rectory lies or the tithes arise.

XI. And be it further enacted, that it shall be lawful for any archbishop, bishop, dean, dean and chapter, archdeacon, prebendary, or other ecclesiastical corporation or person or persons, or the master and fellows of any college, or the master or guardian of any hospital, being, in his or their corporate capacity, the owner or owners of any rectory impropriate, or of any tithes, or portion of tithes, arising in any particular parish or place, by a deed duly executed, to annex such rectory impropriate, or tithes, or portion of tithes as aforesaid, or any lands or tithes, being part or parcel thereof, with the appurtenances, unto any church or chapel within the parish or place in which the rectory impropriate shall lie, or in which the tithes or portion of tithes shall arise, to the intent and in order that the same may be held and enjoyed by the incumbent for the time being of such church or chapel; and every such deed shall be effectual to all intents and purposes whatsoever, any law or statute to the contrary notwithstanding.

Power to annex lands, &c. held by them to any church or chapel under their patronage.

XII. And be it further enacted, that it shall be lawful for any archbishop, bishop, dean, dean and chapter, archdeacon, prebendary, or other ecclesiastical corporation or person or persons, or the master and fellows of any college, or the master or guardian of any hospital, being, in his or their corporate capacity, the owner or owners of any lands, tenements, or other hereditaments whatsoever, and also being in his or their corporate capacity the patron or patrons of any church or chapel, by a deed duly executed, to annex such lands, tenements, or other hereditaments, with the appurtenances, unto such church or chapel, to the intent and in order that the same premises may be held and enjoyed by the incumbent for the time being thereof; and every such deed shall be effectual to all intents and purposes whatsoever, any law or statute to the contrary notwithstanding.

Such annexations to be subject to prior leases, and the rents reserved upon the same, or some portion thereof, to be determined by the deed of annexation.

XIII. Provided always, and be it further enacted, that in any case in which any rectory impropriate, tithes, or portion of tithes, lands, tenements, or other hereditaments, shall be annexed to any church or chapel, pursuant to either of the powers hereinbefore in that behalf contained, the annexation thereof shall be subject and without prejudice to any lease or leases which previously to such annexation may have been made or granted of the same premises or any part thereof; provided also, that in every such case any rent or rents which

may have been reserved in respect of the said premises in and by such lease or leases, or (in case any other hereditaments shall have been also comprised in such lease or leases) some proportional part of such rent or rents, such proportional part to be fixed and determined in and by the instrument by which the annexation shall be made, shall during the continuance of the said lease or leases be payable to the incumbent for the time being of the church or chapel to which the premises shall be annexed as aforesaid; and accordingly such incumbent for the time being shall, during the continuance of such lease or leases, have all the same powers for enforcing payment of the same rent or rents, or of such proportional part thereof as aforesaid, as the person or persons or body politic by whom the annexation shall have been made might have had in that behalf in case the said premises had not been annexed.

Provisions of 39 & 40 Geo. III. c. 41, to extend to such annexations, in certain cases.

XIV. And be it further enacted and declared, that where any rectory impropriate, tithes, or portion of tithes, lands, tenements, or other hereditaments, which shall be annexed to any church or chapel under either of the powers hereinbefore in that behalf contained, or any part thereof, shall have been anciently or accustomably demised with other hereditaments in one lease, under one rent, or divers rents issuing out of the whole, and after such annexation such other hereditaments as aforesaid, or any part thereof, shall be demised by a separate lease or leases, all the provisions of an act passed in the thirty-ninth and fortieth years of the reign of his late majesty King George the Third, intituled *An Act for explaining and amending several Acts made in the Thirty-second Year of King Henry the Eighth, and the First, Thirteenth, and Fourteenth Years of the Reign of Queen Elizabeth, so far as respects Leases granted by Archbishops, Bishops, Masters and Fellows of Colleges, Deans and Chapters of Cathedral and Collegiate Churches, Masters and Guardians of Hospitals, and others, having any Spiritual or Ecclesiastical Living or Promotion*, shall apply and take effect in the same manner as if the premises which shall be so annexed as aforesaid had been retained in the possession or occupation of the person or persons by whom such lease or leases as aforesaid shall be made (*p*).

Certain powers to apply to persons entitled to alternate presentation.

XV. And be it further enacted, that such of the powers hereinbefore contained as are restricted to cases in which the corporation or person by whom the same may be exercised shall be the patron of the benefice which it shall be intended or desired to augment, shall apply to and may be exercised in cases in which such corporation or person shall be entitled only to the alternate right of presentation to such benefice.

(*p*) See *ante*, p. 685.

1 & 2 Will. IV. c. 45.

Benefices exceeding in yearly value 300*l.* not to be raised, and all others to be limited.

XVI. Provided always, and be it further enacted, that the power given by the said recited act shall not at any time hereafter, nor shall any of the powers hereinbefore contained, in any case, be exercised so as to augment in value any benefice whatsoever, which at the time of the exercise of the power shall exceed in clear annual value the sum of 300*l.*, or so as to raise the clear annual value of any benefice to any greater amount than such sum of 350*l.*, or 300*l.* not taking account of surplice fees.

Power to determine the yearly value of any hereditaments for the purposes of the act.

XVII. And be it further enacted, that in every case in which it shall be desired, upon the exercise of any of the said powers, to ascertain, for the purposes of this act, the clear yearly value of any benefice, or of any rectory impropriate, tithes, or portion of tithes, lands, tenements, or other hereditaments, it shall be lawful for the archbishop or bishop of the diocese within which the benefice to be augmented shall be situate, or where the same shall be situate within a peculiar jurisdiction belonging to any archbishop or bishop, then for the archbishop or bishop to whom such peculiar jurisdiction shall belong, to cause such clear yearly value to be determined and ascertained by any two persons whom he shall appoint for that purpose, by writing under his hand, (which writing is hereby directed to be afterwards annexed to the instrument by which the power shall be exercised,) and a certificate of such clear yearly value, written or endorsed on the instrument by which the power shall be exercised, and signed by such persons as aforesaid, shall for all the purposes of this act be conclusive evidence of such clear yearly value as aforesaid.

By whom the above-mentioned powers may be exercised, and with whose consent.

XVIII. Provided always, and be it further enacted, that in every case in which the power given by the said recited act, or any of the powers hereinbefore contained, (other than and except the aforesaid power of deferring the time at which an augmentation is to take effect in possession,) shall be exercised by any bishop, dean, archdeacon, or prebendary, or by the master or guardian of any hospital, the same shall be so exercised in the case of a bishop, with the consent of the archbishop of the province, or in the case of a dean, with the consent of the dean and chapter, or in the case of an archdeacon or prebendary, with the consent of the archbishop or bishop to whose jurisdiction or control they shall be respectively subject, or in the case of the master or guardian of a hospital, with the consent of the patron or patrons, visitor or visitors (if any) of such hospital, such consent as aforesaid to be testified by the said archbishop, dean and chapter, bishop, or patron or patrons, visitor or visitors (as the case may require), executing the instrument by which the power shall be exercised.

Incumbents not to exercise them.

XIX. Provided always, and be it further enacted, that the

incumbent of any benefice or living shall not be authorised to exercise any of the powers aforesaid with respect to any hereditaments to which he may be entitled in right of his benefice.

Incumbent may annex tithes, &c. to which he is entitled, arising out of the limits of his benefice, to the church or chapel of the parish where they arise.

XX. Provided also, and be it further enacted, that where the incumbent of any benefice shall in right of the same be entitled to any tithes or portion of tithes arising in any parish or place not being within the limits of such benefice, it shall be lawful for the incumbent for the time being of such benefice, by a deed duly executed by him, to annex such tithes or portion of tithes as aforesaid, or any part thereof, to any church or chapel within the parish or place in which such tithes or portion of tithes shall arise, to the intent that the same may be enjoyed by the incumbent for the time being of such church or chapel; and every such deed shall be effectual to all intents and purposes whatsoever, any law or statute to the contrary notwithstanding: provided always, that every such annexation as aforesaid shall be made with the consent of the archbishop or bishop of the diocese within which the said benefice shall be situate, (or if the said benefice shall be situate within a peculiar jurisdiction belonging to any archbishop or bishop, then with the consent of the archbishop or bishop to whom such peculiar jurisdiction shall belong,) and also with the consent of the patron or patrons of the said benefice, such consent to be testified by the said archbishop or bishop and the said patron or patrons respectively executing the instrument by which the annexation shall be made.

Power to rectors or vicars to charge their rectories and vicarages for the benefit of chapels of ease, &c.

XXI. And whereas it is expedient that rectors and vicars should be enabled, under proper restrictions, to charge their rectories and vicarages for the benefit and support of chapels of ease situate within such rectories and vicarages, as also in certain other cases; be it therefore further enacted, that it shall be lawful for any rector or vicar for the time being of any rectory or vicarage, by a deed duly executed by him, to annex to any chapel of ease or parochial chapel, or to any district church or chapel, or any chapel having a district assigned thereto, whether already built or hereafter to be built, (such chapel of ease or other chapel or church, with the district or place to which the same belongs, being situate within the limits, or within the original limits, of the said rectory or vicarage,) any part or parts of the tithes or other annual revenues belonging to such rectory or vicarage, or to grant to the incumbent for the time being of any such chapel of ease or other chapel or church, and his successors, any annual sum of money, to be payable by equal quarterly or equal half-yearly payments, and to charge the same on all or any part of such tithes or other revenues as aforesaid, or on any lands or other hereditaments belonging to the said rectory or vicarage; and in every case in which any such tithes or other

1 & 2 Will. IV. c. 45.

revenues shall be annexed to any such church or chapel as aforesaid, the incumbent for the time being thereof shall thenceforth have all the same remedies for recovering and enforcing payment of the premises which shall be so annexed as the rector or vicar for the time being of the rectory or vicarage might have had if such annexation had not been made; and in every case in which any annual sum of money shall be so granted as aforesaid, the incumbent for the time being entitled thereto shall have all such remedies for recovering and enforcing payment thereof by action of debt against the incumbent for the time being of the said rectory or vicarage, or by distress upon the hereditaments to be charged therewith, or otherwise, as shall in that behalf be specified and given by the deed by which the grant shall be made: provided always, that every such grant and annexation shall be made with the consent of the archbishop or bishop of the diocese within which the rectory or vicarage shall be situate, (or if the rectory or vicarage shall be situate within a peculiar jurisdiction belonging to any archbishop or bishop, then with the consent of the archbishop or bishop to whom such peculiar jurisdiction shall belong,) and also with the consent of the patron or patrons of the said rectory or vicarage, such consent to be testified by the said archbishop or bishop and the said patron or patrons respectively executing the instrument by which the annexation or grant shall be made.

Exception to the preceding power.

58 Geo. III. c. 45.

XXII. And whereas by an act passed in the fifty-eighth year of the reign of his late majesty King George the Third, intituled *An Act for building and promoting the building of additional Churches in populous Places*, provision was made, under certain restrictions, for enabling any parish to be divided into two or more distinct parishes, and for apportioning in such cases the glebe lands, tithes, moduses, or other endowments between the respective divisions; and it was thereby provided with respect to every such case, that during the incumbency of the existing incumbent of the parish every new church intended as the parish church of any division intended to become a distinct parish should remain a chapel of ease; be it further enacted, that the power last hereinbefore contained shall not be exercised for the purpose of making an annexation or grant to any chapel of ease situate within any division which under the provisions of the said last-recited act shall be intended to become a distinct parish.

Manner in which consent to the exercise of powers in this act shall be testified, where patronage of benefice is in the crown;

XXIII. And be it further enacted, that in any case in which the consent of the patron of any benefice shall be required to the exercise of any power given by this act, and the patronage of such benefice shall be in the crown, the consent of the crown to the exercise of such power shall be testified in the manner hereinafter mentioned; (that is to say,) if such benefice shall

be above the yearly value of twenty pounds in the king's books the instrument by which the power shall be exercised shall be executed by the lord high treasurer or first lord commissioner of the treasury for the time being; and if such benefice shall not exceed the yearly value of twenty pounds in the king's books such instrument shall be executed by the lord high chancellor, lord keeper or lords commissioners of the great seal for the time being; and if such benefice shall be within the patronage of the crown in right of the duchy of *Lancaster* such instrument shall be executed by the chancellor of the said duchy for the time being; and the execution of such instrument by such person or persons shall be deemed and taken, for the purposes of this act, to be an execution by the patron of the benefice.

where patron is an incapacitated person;

XXIV. And be it further enacted, that in any case where the consent of the patron of any benefice shall be required to the exercise of any power given by this act, and the patron of such benefice shall be a minor, idiot, lunatic, or feme covert, it shall be lawful for the guardian or guardians, committee or committees, or husband of such patron (but in case of a feme covert with her consent in writing) to execute the instrument by which such power shall be exercised, in testimony of the consent of such patron; and such execution shall for the purposes of this act be deemed and taken to be an execution by the patron of the benefice.

where patronage is part of the possessions of the duchy of Cornwall.

XXV. And be it further enacted, that in any case in which the consent of the patron of any benefice shall be required to the exercise of any power given by this act, and the advowson and right of patronage of such benefice shall be part of the possessions of the duchy of *Cornwall*, the consent of the patron of such benefice to the exercise of such power shall be testified in the manner hereinafter mentioned; (that is to say,) the instrument by which the power shall be exercised shall be executed by the duke of *Cornwall* for the time being, if of full age, but if such benefice shall be within the patronage of the crown in right of the duchy of *Cornwall* such instrument shall be executed by the same person or persons who is or are by this act authorised to testify the consent of the crown to the exercise of any power given by this act in respect of any benefice in the patronage of the crown; and the execution of such instrument by such person or persons shall be deemed and taken, for the purposes of this act, to be an execution by the patron of the benefice.

Instruments to be deposited in the registry of the diocese.

XXVI. Provided always, and be it further enacted, that in every case in which the power given by the said recited act of the twenty-ninth year of the reign of King Charles the Second, or any of the powers hereinbefore contained, shall be exercised, the instrument by which the same shall be so exercised

1 & 2 Will. IV. c. 45.

shall within two calendar months after the date of the same be deposited in the registry of the diocese within which the benefice augmented or otherwise benefited shall be locally situate, or where the same shall be situate within a peculiar jurisdiction belonging to any archbishop or bishop, then in the registry of such peculiar jurisdiction.

Office copies of instruments deposited in the registry to be evidence.

XXVII. And be it further enacted, that an office copy of any instrument which under the provisions of this act shall be deposited in any such registry as aforesaid (such office copy being certified by the registrar or his deputy) shall be allowed as evidence thereof in all courts and places, and every person shall be entitled to require any such office copy, and shall also be allowed, at all usual and proper times, to search for and inspect any instrument which shall be so deposited, and the registrar shall be entitled to the sum of five shillings and no more for depositing any such instrument as aforesaid, and to the sum of one shilling and no more for allowing any such search or inspection as aforesaid, and to the sum of six-pence and no more (besides stamp duty) for every law folio of seventy-two words in any office copy to be made and to be certified as aforesaid.

Fee to the registrar.

Extent of the word "benefice" in this act.

XXVIII. And be it further enacted, that the word "benefice" in this act shall be construed and taken to comprehend rectories, vicarages, donatives, perpetual curacies, parochial and consolidated chapelries, district parishes and district chapelries, and churches and chapels having a district assigned thereto.

Act to apply to all heads of colleges, under whatever denomination.

XXIX. And be it further enacted, that the powers by this act given to the master and fellows of any college shall apply to cases in which the head of the college shall be called the warden, dean, provost, president, rector, or principal thereof, or shall be called by any other denomination, and that such powers shall extend to every college and hall in the universities of *Oxford* and *Cambridge*, and to the colleges of *Eton* and *Winchester*.

To extend to England and Wales.

XXX. Provided also, and be it further enacted, that this act shall extend only to that part of the United Kingdom called *England* and *Wales*.

APPLICATION TO COURTS OF EQUITY RESPECTING THE FUNDS AND TRUSTEES OF CHARITIES, 2 WILLIAM IV. c. 57, 23rd June, 1832.

An Act to continue and extend the Provisions of an Act passed in the Fifty-ninth Year of His Majesty King George the Third, for giving additional Facilities in Applications to Courts of Equity regarding the Management

of Estates or Funds belonging to Charities; and for making certain Provisions respecting Estates or Funds belonging to Charities.

WHEREAS by an act passed in the fifty-ninth year of the reign of his late majesty King George the Third, it was, amongst other things, enacted (*q*), that whenever, upon any examination or investigation taken or had by and before the commissioners appointed or to be appointed under the authority of certain acts of the fifty-eighth and fifty-ninth years of his said late majesty thereinbefore mentioned, any case should arise or happen in which it should appear to the said commissioners that the directions or orders of a court of equity were requisite for the remedying of any neglect, breach of trust, fraud, abuse, or misconduct in the management of any trust created for any charitable purposes as thereinbefore mentioned, or of the estates or funds thereunto belonging, or for the regulating the administration of any such trust, or of the estates or funds thereof, it should and might be lawful for the said commissioners, or any five or more of them, if they should think fit, to certify the particulars of such case in writing under their hands to his majesty's attorney general, and thereupon it should be lawful for his majesty's attorney general, if he should so think fit, either by a summary application in the nature of a petition, or by information, as the case might require, to apply to or commence a suit in his majesty's high court of chancery, or to or in his majesty's court of exchequer sitting as a court of equity, stating and setting forth the neglect, breach of trust, fraud, abuse, or misconduct, or other cause of complaint or application, and praying such relief as the nature of the case might require; and after such petition should have been presented or suit instituted, such proceedings were to be had thereupon as in the said act now in recital mentioned: and whereas the powers of the said commissioners expired on the 1st day of July, 1830, and many charities still remain to be investigated: and whereas an act was passed in the last session of parliament, intituled *An Act for appointing Commissioners to continue the Inquiries concerning Charities in England and Wales for Two Years, and from thence to the End of the then next Session of Parliament*, whereby his majesty was empowered to issue a commission, enabling the commissioners therein to be named to investigate such remaining charities: and whereas it is expedient that the provisions of the said recited act of the fifty-ninth year of the reign of his said late majesty should be continued in manner hereinafter mentioned; and it is also expedient to facilitate the proofs in proceedings instituted or

2 WILL. IV. c. 57.

1 & 2 WILL. IV. c. 45.

(*q*) *Ante*, p. 848.

2 Will. IV. c. 57.

to be instituted under the said last-mentioned act, or of this act, in manner hereinafter mentioned: and whereas it is expedient to make such provisions respecting estates or funds belonging to charities as hereinafter mentioned; be it therefore enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that it shall and may be lawful for the said commissioners appointed or to be appointed under the authority of the said act of the last session of parliament, or under the authority of any act to be hereafter passed for the like purpose, or any five or more of them, to make such certificates from time to time to his majesty's attorney general as the commissioners appointed under the authority of the said acts of the fifty-eighth and fifty-ninth years of the reign of his said late majesty were empowered to do; and thereupon such proceedings shall or may be had and taken as were authorised or directed by the said recited act of the said fifty-ninth year of his said late majesty's reign, in the same manner to all intents and purposes as if the provisions of that act, as to such certificates and proceedings, were embodied in and re-enacted by this act (*r*).

Commissioners appointed under recited act of 1 & 2 Will. IV. authorised to make certificates to the attorney general as commissioners under former acts were empowered to do.

II. And be it further enacted, that in all cases of proceedings instituted or to be instituted by his majesty's attorney-general in pursuance of the said recited act of the fifty-ninth year of his said late majesty's reign, or of this act, the production to the court of a certificate under the hand of his majesty's attorney general, stating that the particulars of the case in question, in writing, have been certified to his majesty's attorney general for the time being according to the provisions of the said recited act of the fifty-ninth year of his said late majesty, or of this act, as the case may be, shall be deemed sufficient evidence that such particulars have been duly certified to his majesty's attorney general accordingly, to and for all intents and purposes whatsoever.

Attorney general's certificate to be evidence of particulars of cases having been duly certified by commissioners.

III. [Courts of chancery or exchequer empowered to direct conveyances of charity estates in certain cases (*s*).]

IV. And be it further enacted, that whenever it shall appear to the said commissioners to be appointed under the authority of the said act of the last session of parliament that the property belonging to any charity consists only of one or more annuity or rent-charge, annuities or rent-charges, not exceeding in the whole the yearly sum of 20*l*., and that there are no existing trustees or persons legally qualified to receive and give an effectual discharge for such annuity or rent-

For empowering resident ministers and churchwardens to receive rent-charges belonging to charities, where there are no existing trustees.

(*r*) See 5 & 6 Will. IV. c. 71, s. 18, *post*.

(*s*) This section of the act has been inserted *verbatim*, *ante*, pp. 506.

charge, annuities or rent-charges, it shall and may be lawful for any five of the said commissioners, by writing under their hands and seals, to empower the resident minister and the churchwardens or chapelwardens for the time being of the parish or place interested in such charity, in case only one parish or place is so interested, but if more than one parish or place is so interested, then the resident minister and the churchwardens or chapelwardens of some one of the parishes or places interested, to receive the said annuity or rent-charge, annuities or rent-charges, or any arrears thereof, and to apply the same according to the purposes of the charitable donations or bequests thereof, in the same manner as the trustees of the said charity would have been bound to do; and the power so to be given to such minister and churchwardens or chapelwardens shall remain in force until trustees of the said charity duly appointed shall appear and claim the administration of the funds thereof, or until trustees of the said charity shall be appointed by the court of chancery or court of exchequer; and all receipts to be given by such minister and churchwardens or chapelwardens shall be effectual discharges to the persons liable to the payment of such annuities or rent-charges for all such sums as in such receipts shall be expressed to have been received in respect thereof; and in case of nonpayment of such annuities or rent-charges, or any arrears thereof, it shall and may be lawful for such minister and churchwardens or chapelwardens respectively, during the continuance of the power to be given to them by virtue of the provisions of this act, to use and exercise all such powers and remedies for recovering and compelling payment of the said annuities or rent-charges, and the arrears thereof, as the trustees of the said charities respectively might or could have done if duly appointed. 2 Will. IV. c. 57.

CHARITABLE GIFTS IN FAVOUR OF ROMAN CATHOLICS, 2 & 3 WILLIAM IV. c. 115, 15th Aug. 1832.

An Act for the better securing the Charitable Donations and Bequests of His Majesty's Subjects in Great Britain professing the Roman Catholic Religion.

WHEREAS by an act passed in the first year of the reign of King William and Queen Mary, intituled *An Act for exempting his Majesty's Protestant Subjects dissenting from the Church of England from the Penalties of certain Laws*, and by certain subsequent statutes, the schools and places for religious worship, education, and charitable purposes of pro- 2 & 3 Will. IV. c. 115. 1 W. & M. c. 18.

2 & 3 Will. IV. c. 115.

testant dissenters are exempted from the operation of certain penal and disabling laws to which they were subject previously to the passing of the said recited act of the first year of the reign of King William and Queen Mary: and whereas by certain acts of the parliament of *Scotland*, and particularly by an act passed in the year one thousand seven hundred, intituled, *An Act for preventing the Growth of Popery*, various penalties and disabilities were imposed upon persons professing the Roman catholic religion in *Scotland*: and whereas, notwithstanding the provisions of various acts passed for the relief of his majesty's Roman catholic subjects from disabling laws (*t*), doubts have been entertained whether it be lawful for his majesty's subjects professing the Roman catholic religion in *Scotland* to acquire and hold in real estate the property necessary for religious worship, education, and charitable purposes: and whereas it is expedient to remove all doubts respecting the right of his majesty's subjects professing the Roman Catholic religion in *England* and *Wales* to acquire and hold property necessary for religious worship, education, and charitable purposes: be it therefore enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and after the passing of this act his majesty's subjects professing the Roman catholic religion, in respect to their schools, places for religious worship, education, and charitable purposes, in Great Britain, and the property held therewith, and the persons employed in or about the same, shall in respect thereof be subject to the same laws as the protestant dissenters are subject to in *England* in respect to their schools and places for religious worship, education, and charitable purposes, and not further or otherwise.

1700. c. 3.

Roman catholics to be subject to the same laws as protestant dissenters, with respect to schools and places of worship.

Roman catholic schoolmasters, when required to take oath, to take that prescribed by 10 Geo. IV. c. 7.

II. Provided always, and be it further enacted, that in all cases in which schoolmasters or other persons employed in such schools or other places are, as a legal qualification for such employments, now required by law to take the oath of supremacy, or the oath or declaration against transubstantiation, and the invocation of saints, and sacrifice of the mass, or to receive the sacrament of our Lord's supper, or in *Scotland*, to subscribe the formula annexed to the foresaid act for preventing the growth of popery, any such schoolmaster, or other master, professing himself a Roman catholic, shall, in lieu of the qualification aforesaid for holding such employment, take the oath contained in the statute passed in the tenth year of his late majesty, intituled *An Act for the*

(*t*) See *ante*, pp. 109—111.

Relief of his Majesty's Roman Catholic Subjects, and at the times and in manner in that act mentioned. 9 & 3 Will. IV. c. 115.

III. Provided always, and be it further enacted, that nothing in this act contained shall affect any suit actually pending or commenced, or any property now in litigation, discussion, or dispute, in any of his majesty's courts of law or equity in Great Britain (*u*). Act not to affect pending suits.

IV. Provided always, and be it further enacted, that nothing in this act contained shall be taken to repeal or in any way alter any provision of an act passed in the tenth year of the reign of his late majesty King George the Fourth, intituled *An Act for the Relief of his Majesty's Roman Catholic Subjects*, respecting the suppression or prohibition of the religious orders or societies of the church of Rome bound by monastic or religious vows. Nor to repeal provisions in 10 Geo. IV. c. 7, for suppression of certain religious societies.

V. Provided always, and be it further enacted, that all property to be acquired or held for such purposes of religious worship, education, and charitable purposes, in *England* and *Wales*, shall be subject to the provisions of an act passed in the ninth year of the reign of King George the Second, intituled *An Act to restrain the disposition of Lands whereby the same may become unalienable*, and to the same laws as the protestant dissenters are subject to in *England* in respect of the acquiring or holding of such property (*v*): provided always, that nothing in this act contained shall be taken to extend the provisions of the said last-recited act to that part of Great Britain called *Scotland*. Property held for the purposes mentioned in this act, in England and Wales, to be subject to the provisions of 9 Geo. II. c. 36.

University Life Assurance Society, 5 & 6 William IV. c. 4, 13th April, 1835.

An Act to enable the University Life Assurance Society and their Successors to purchase Annuities upon or for Lives, and also to lend Money or Stock upon Mortgage for the purpose of Investment (*w*).

The heads of this act are as follows:— 5 & 6 Will. IV. c. 4.

I. Recites the charter of incorporation, dated 28th June, 1826, and authorises the corporation to purchase annuities, &c., issuable out of land, &c.

II. Power for corporation to lend money or stock, on the security of lands, tenements, and hereditaments, &c.

III. Existing conveyances and assurances to be valid and effectual.

(*u*) *Ante*, pp. 112—116. The case of *West* v. *Shuttleworth*, there stated, is now reported 2 Mylne & Keen, 684.

(*v*) *Ante*, pp. 100—105.

(*w*) See *ante*, pp. 10—12, n. (*e*).

5 & 6 Will. IV. c. 4.

IV. Corporation authorised to file bills for foreclosure, or to purchase equity of redemption of estates mortgaged to them.

V. Sales of such estates not to be delayed beyond five years, unless for causes stated.

VI. Power for corporation to hold lands, &c. charged with annuities, or mortgaged to them, without license in mortmain.

VII. Receipts of persons appointed by the corporation, or by the court of directors, to be sufficient discharges.

VIII. Property of corporation to be considered and treated as personal estate.

IX. Power for corporation to make bye-laws.

X. Power for corporation to plead the general issue.

XI. This act to be deemed a public act.

ACT FOR APPOINTING COMMISSIONERS TO INQUIRE CONCERNING CHARITIES, 5 & 6 WILLIAM IV. c. 71, 9th September, 1835.

An Act for appointing Commissioners to continue the Inquiries concerning Charities in England and Wales until the First Day of March One Thousand Eight Hundred and Thirty-seven.

5 & 6 Will. IV. c. 71.

WHEREAS an act was passed in the fifty-eighth year of the reign of his late majesty King George the Third, intituled *An*

58 Geo. III. c. 91.

Act for appointing Commissioners to inquire concerning Charities in England for the Education of the Poor (*x*); and another act was passed in the fifty-ninth year of the same reign,

59 Geo. III. c. 81.

intituled *An Act to amend an Act of the last Session of Parliament, for appointing Commissioners to inquire concerning Charities in England for the Education of the Poor, and to extend the Powers thereof to other Charities in England and Wales, to continue in force until the First Day of August One Thousand Eight Hundred and Twenty-three* (*y*), *and from thence until the End of the then next Session of Parliament*; and an act was passed in the fifth year of the reign of his late

5 Geo. IV. c. 58.

majesty King George the Fourth, intituled *An Act to continue for Four Years, and from thence until the end of the then next Session of Parliament, the Powers of the Commissioners for inquiring concerning Charities in England and Wales*; and an act was passed in the tenth year of the same reign, in-

10 Geo. IV. c. 57.

tituled *An Act to continue, until the First Day of July One Thousand Eight Hundred and Thirty, the Powers of the Commissioners for inquiring concerning Charities in England and*

(*x*) *Ante*, pp. 305, 306. (*y*) *Ante*, pp. 307, 308.

Wales: and whereas an act was passed in the first and second years of the reign of his present majesty, intituled *An Act for appointing Commissioners to continue the Inquiries concerning Charities in England and Wales for Two Years, and from thence to the End of the then next Session of Parliament* (*z*): and whereas the commissioners appointed under and by virtue of the said two first-mentioned and the said last-mentioned acts respectively pursued the inquiries thereby authorised and directed, and made several reports of their proceedings; but the powers of the commissioners appointed under the said last-mentioned act expired on the fifteenth day of August one thousand eight hundred and thirty-four: and whereas many charities still remain to be investigated, and further time will be required for that purpose; and it is therefore expedient that commissioners should be appointed for the purposes aforesaid, to act according to the provisions and limitations hereinafter expressed and contained: and whereas an act was passed in the second year of the reign of his present majesty, intituled *An Act to continue and extend the Provisions of an Act passed in the Fifty-ninth Year of His Majesty King George the Third, for giving additional Facilities in Applications to Courts of Equity regarding the Management of Estates or Funds belonging to Charities; and for making certain Provisions respecting Estates or Funds belonging to Charities* (*a*): and whereas it is expedient that certain of the provisions of the said last-recited act should be continued in manner hereinafter mentioned: be it therefore enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that it shall and may be lawful for his majesty to issue a commission under the great seal to any number of persons, not fewer than thirty, who shall be constituted commissioners for the purposes intended by this act, one of whom shall be and be denominated the chief commissioner, and shall superintend and direct the mode of proceeding of the other commissioners acting in the execution of this act; and that they the said commissioners shall and they are hereby empowered and required, in manner hereinafter mentioned, to examine into and investigate the amount, nature, and application of all estates and funds of what nature or kind soever, and the produce thereof, destined or intended to be applied to the purpose of educating the poor in *England* and *Wales*, or to the support of any charity or charities or charitable donation or donations for the benefit of poor persons in *England* and *Wales*, or held under trusts created

5 & 6 Will. IV. c. 71.

1 & 2 Will. IV. c. 34.

2 Will. IV. c. 57.

Commissioners to be appointed to inquire into the nature and management of charities.

(*z*) *Ante*, pp. 309, 310. (*a*) *Ante*, pp. 505, 506.

5 & 6 Will. IV. c. 71.

for any charitable uses or purposes whatever in *England* or *Wales* (except as is hereinafter provided and excepted,) and to examine into and investigate all breaches of trust, irregularities, frauds, abuses or supposed abuses, or misconduct in relation to and in the management or appropriation or non-appropriation or misappropriation of such estates and funds; and the said commissioners shall once in each half year during the continuance of the said commission report and certify, in writing under their hands and seals, to the king's most excellent majesty, their proceedings touching the amount, nature, management, application, and appropriation, of such of the aforesaid estates and funds as they shall have inquired and examined into, and also what is the nature of such estates and funds respectively, and the actual annual produce thereof, and what is the actual annual value thereof, and in whose possession, as tenants thereof, any part thereof, consisting of lands, tenements, or hereditaments, shall be, adding at the same time such observations as shall occur to them respecting such mode as they shall deem most effectual for the recovering of such part or parts of such estates or funds as shall appear to them to have been applied in breach of the several trusts created in respect of the same, or shall appear to have been omitted to be applied in pursuance of such trusts, and subjoining such suggestions as may seem to them expedient respecting the most effectual mode of securing such estates and funds and their respective produce against any future misapplication thereof.

To report half-yearly.

Commissioners to report special circumstances, where funds cannot be applied to destined purposes.

II. And be it enacted, that if upon such inquiry as aforesaid it shall appear to the said commissioners that, from any cause whatsoever, it has become impossible to apply the estates or funds aforesaid, or any part thereof, to the purposes to which the same were destined or directed to be applied, the said commissioners shall report the special circumstances of each case, subject, as to the mode of making such report, to the directions of the chief commissioner in that behalf.

Salaries to a limited number of commissioners.

III. And be it enacted, that no remuneration shall be given for and in respect of the execution of this act to such of the said commissioners as shall be members of either house of parliament, nor to any number exceeding twenty of the commissioners; but there shall be allowed and paid to every such commissioner such reasonable sums for and in respect of such travelling expenses as may be incurred in the execution of this act as in the judgment of the lord high treasurer or the commissioners of his majesty's treasury for the time being shall be deemed requisite.

Commissioners to take oath

IV. And be it enacted, that each of the said commissioners to be appointed by virtue of this act shall, previously to his

entering upon the execution of the same, take an oath before the chancellor of the exchequer or the master of the rolls for the time being (which oath they are hereby respectively authorised and required to administer), the tenor whereof shall be as followeth; (that is to say,)

before entering upon their duties.

"I, *A. B.*, do swear, that, according to the best of my skill and knowledge, I will faithfully, impartially, and truly execute the several powers and trusts vested in me by an act, intituled [*here insert the title of this act*], according to the tenor and purport of the said act."

Vacancies of commissioners may be filled up by the crown.

V. And be it enacted, that in case of a vacancy or vacancies by the death, removal, or resignation of any such commissioners, it shall be lawful for his majesty, his heirs and successors, to nominate and appoint such person or persons as he or they may think proper for the supplying of such vacancy or vacancies.

Appointment of secretary, clerks, &c.

VI. And be it enacted, that it shall and may be lawful for the said commissioners and they are hereby authorised to appoint and employ such secretary, clerks, messengers, and officers, not exceeding in the whole one secretary, twenty clerks, one messenger, and two other officers, as they shall think meet, and to administer to each of the said secretary, clerks, and officers, an oath for his true and faithful demeanor in all things relating to the due performance of any trust respecting the execution of this act reposed in him by the said commissioners, and in all other things touching the premises; which secretary, clerks, and officers are hereby required faithfully to execute and perform the said trust in them severally and respectively reposed, without taking any thing for such their service other than such salary or reward as the said commissioners shall think fit to direct and appoint in their behalf.

Commissioners to hold sittings and summon persons and send for papers.

VII. And be it enacted, that, for the purpose of prosecuting the inquiries and examinations by this act directed, the said commissioners, or any one or more of them, shall from time to time hold their or his sittings, with or without adjournment, within the city of *Westminster*, or in any other city, town, borough, hamlet, village, or place respectively in *England* or *Wales*, which to them or him shall appear most convenient for executing the purposes of this act; and the said commissioners or commissioner are or is hereby authorised to require, by precepts under their or his hands and seals or hand and seal, from any person or persons acting as a trustee or trustees for any of the said estates or funds, or having any concern in the management or administration of the same, or in the payment or receipt of any of the said funds or estates, or any charge upon any fund or estate applicable to any charitable uses or purposes as aforesaid, to render to the said commissioners or commissioner a true account, as

5 & 6 Will. IV. c. 71.

far as consists with their knowledge, of all that relates to such funds or estates as aforesaid under their trust or management, or on account of which they may have acted in making or receiving payments; and, as often as need shall be, to send their or his precepts, under their or his hands and seals or hand and seal, for any person or persons whomsoever to attend them or him, and require such person or persons to bring with him, her, or them any deed, paper, writing, instrument, or other document being in his, her, or their custody and possession, and relating to any such estates or funds, or the produce thereof, or to the receipt or application or nonapplication or misapplication thereof, which shall in the judgment of such commissioners or commissioner be conducive and necessary to the due execution of the purposes of this act; and every person to whom such precept shall as aforesaid have been addressed and delivered is hereby required and directed punctually to attend the said commissioners or commissioner at such time and place as shall for that purpose have been appointed; and to every such person or persons may be paid such sum of money as in the judgment of the said commissioners or commissioner shall be just and reasonable: provided always, that no such person shall be obliged to travel in obedience to such precept more than ten miles from his or her place of abode.

No person obliged to travel more than ten miles.

Commissioners empowered to examine upon oath.

VIII. And for rendering more effectual all such examinations as are intended to be had under this act, be it enacted, that the said commissioners, or one or more of them, are or is hereby authorised to examine upon oath, or upon the affirmation of persons exempted by law from liability to examination upon oath, (which oath or affirmation the said commissioners, or any one or more of them, are or is hereby respectively authorised to administer,) all persons whom the said commissioners, or any one or more of them, are or is by the provisions of this act empowered to call before them or him to be examined touching all matters and things necessary for the execution of the powers vested in them or him by this act.

Examinations and papers to be transmitted to office in Westminster.

IX. And be it enacted, that the said commissioners respectively shall and they are hereby required to cause the examinations which shall be taken before them respectively, and all papers and documents being parts of such examinations, to be from time to time transmitted to the secretary of the said commissioners at their office in *Westminster* aforesaid.

Penalties of perjury for false swearing.

X. And be it enacted, that in case any person upon examination on oath or upon affirmation, as the case may be, before the said commissioners or commissioner, shall wilfully and corruptly give false evidence, every such person so offending, and being thereof duly convicted, shall be and is hereby

declared to be subject and liable to such pains and penalties as under any law now in force may be inflicted on persons convicted of wilful and corrupt perjury.

Persons refusing to appear before commissioners, or to produce deeds, &c. or to answer questions, liable to be fined by the court of king's bench or exchequer.

XI. And be it enacted, that if any person summoned to appear before the said commissioners, or any one or more of them, shall wilfully omit or refuse to appear before such commissioners or commissioner, or to bring or to produce any deed, paper, or writing, instrument or other document, in his or her possession, custody, or power, and which he or she shall be required by the precept of any such commissioners or commissioner to produce, relating wholly to the estates or funds which shall be the subject of inquiry before the said commissioners or commissioner, or to the receipt or application or nonapplication or misapplication thereof, or to the state of the schools or charities which shall be the subject of inquiry before such commissioners or commissioner, or the true copy of any part or parts of any deed, paper, writing, or other instrument (and which copy any such commissioners or commissioner are or is hereby empowered to require by such precept) or shall refuse to be sworn, or, being a person exempted by law from liability to examination upon oath, to affirm, or, being sworn or having affirmed, as the case may be, shall refuse to answer to and before the said commissioners or commissioner, or to answer fully any lawful question on oath or affirmation respectively touching or concerning any matter or thing relating to such estates or funds as aforesaid, or to the state of such schools or charities as aforesaid (except in cases excepted by this act), every such person so refusing to comply with any such lawful requisitions of the said commissioners or commissioner shall be liable to the payment of such fine to his majesty as the court of king's bench or the court of exchequer, on application made by or on the behalf of the said commissioners or commissioner, or by his majesty's attorney general for the time being, shall think fit to set and impose, which fine the said court of king's bench or court of exchequer is hereby authorised and empowered to set and impose according to their discretion respectively, and to enforce payment of the same, by attachment or otherwise, in such manner as the said courts respectively may do in cases of contempt of the same courts.

Purchasers without notice not bound to answer interrogatories.

XII. Provided always, and be it enacted, that if any person who shall be summoned to appear before the said commissioners, or any one or more of them, shall upon his or her examination allege that he or she hath purchased or obtained for valuable consideration any estate or interest of, in, to, or out of any lands, tenements, rents, or annuities, hereditaments, goods, or chattels, touching which he or she shall be sought to be so examined, without fraud or covin, having

5 & 6 Will. IV. c. 71.

no notice of any charitable trust or use to which the said lands, tenements, rents, annuities, hereditaments, goods, or chattels, or any charge thereon, have or has been given, limited, or directed to be applied, then such person shall not be bound to make further answer to any interrogatory of such commissioners or commissioner, nor to produce or show to them or him any deed, paper, writing, instrument, or other document relating to his or her estate or interest in such lands, tenements, rents, annuities, hereditaments, goods, or chattels.

Mortgagees, trustees, &c. not compellable to produce deeds without notice to mortgagors, cestui que trusts, &c.

XIII. Provided also, and be it enacted, that no person having the custody of any deed, paper, writing, instrument, or other document, as mortgagee, trustee or agent, solicitor or attorney, shall be compellable to produce the same, or to give any evidence as to the contents thereof, without notice being first given to his mortgagor, cestui que trust, or principal, and the said mortgagor, cestui que trust, or principal being examined touching the same by the said commissioners or commissioner; and in case such mortgagor, cestui que trust, or principal shall by the provisions of this act be exempted from producing the said deed, paper, writing, instrument, or other document, then the mortgagee, trustee or agent, solicitor or attorney, shall not be bound to produce or show the same, or give any evidence of the contents thereof, to the said commissioners or commissioner: provided also,

Persons not compellable to criminate themselves.

that no person shall be compellable to answer any question, or to produce any deed, paper, writing, instrument, or other document, the answer to which or the production of which may criminate or tend to criminate such person, or to expose such person to any pains or penalties.

Letters to and from commissioners to be free of postage if sent conformably hereto.

XIV. And be it enacted, that the said commissioners shall and may receive and send by the general post from and to places within the United Kingdom all letters and packets relating solely and exclusively to the execution of this act free from the duty of postage, provided that such letters and packets as shall be sent to the said commissioners shall be directed to the "Commissioners of Charities," at their office in *Westminster*, and that all such letters and packets as shall be sent by the said commissioners shall be in covers with the words "Office of Commissioners of Charities, pursuant to an Act of Parliament passed in the sixth year of the reign of his Majesty King William the Fourth," printed on the same, and be signed on the outside thereof under such words with the name of such person as the said commissioners, with the consent of the lords commissioners of the treasury or any three or more of them, shall authorise and appoint, in his own handwriting, (such name to be from time to time transmitted to the secretaries of the general post office in *London* and *Dublin*,) and under such other regulations and restric-

tions as the said lords commissioners, or any three or more of them, shall think proper and direct; and the person so to be authorised is hereby strictly forbidden so to subscribe any letter or packet whatsoever except such only concerning which he shall receive the special direction of his superior officer, or which he shall himself know to relate solely and exclusively to the execution of this act; and if the person so to be authorized, or any other person, shall send, or cause or permit to be sent, under any such cover, any letter, paper, or writing, or any inclosure other than what shall relate to the execution of this act, every person so offending shall be dismissed from his office, and shall forfeit and pay the sum of one hundred pounds, one moiety of the said penalty to the use of his majesty, his heirs and successors, and the other moiety to the use of the person who shall inform or sue for the same, to be sued for and recovered in any of his majesty's courts of record at *Westminster*; and if any letter, paper, or writing, or other inclosure, shall be sent under cover to the said commissioners, the same not relating solely and exclusively to the execution of this act, they are hereby strictly required and enjoined to transmit the same forthwith to the secretary of the post office in *London*, with the covers under which the same shall be sent, in order that the contents thereof may be charged with the full rates of postage.

Penalty and loss of office for sending letters not relating solely to the business of the act.

In case of letters sent under cover to the commissioners, not relating solely to the business of the act.

XV. And be it enacted, that whenever any extract from the enrolment of any charter or deed, or from any decree, report, record, or other document whatever, deposited or remaining in any of the offices belonging to or under the control of the courts of chancery or exchequer, or in any public registry, shall be required for the purposes of this act by any order signed by one of the commissioners under this act, the officer or officers having the custody of such enrolment, decree, report, record, or other document, shall furnish an extract of so much only as shall be so required of any such enrolment, decree, report, record, or other document; and that any such extract, or any copy, which shall be required for the purposes of this act by any order signed by one of the said commissioners, of any such enrolment, decree, report, record, or other document, shall not be subject or liable to the payment of any stamp duty whatever, any law, statute, or usage to the contrary in anywise notwithstanding.

Officers having custody of records to furnish extracts if required by a commissioner.

No stamp duty on extracts or copies required by a commissioner.

XVI. And be it enacted, that this act or any of the provisions therein contained shall not extend or be construed to extend to either of the universities of *Oxford* or *Cambridge*, nor to any college or hall within the same, nor to any schools or other endowments of which the said universities, colleges, or halls are trustees, nor to the colleges of *Westminster*, *Eton*,

Act not to extend to universities, public schools, &c.

5 & 6 Will. IV. c. 71.

or *Winchester*, nor to the Charter House, nor to the schools of *Harrow* or *Rugby*, or any of them, nor to the corporation of the Trinity House of *Deptford Strond*, nor to any cathedral or collegiate church within *England* or *Wales*, nor to any funds applicable to the benefit of any persons of the Jewish persuasion, or the people called Quakers, or persons of the Roman Catholic persuasion, and which shall be under the superintendence and control of persons of such persuasions respectively.

nor to charities chiefly supported by voluntar contributions;

XVII. Provided also, and be it enacted, that this act or any of the provisions therein contained shall not extend or be construed to extend to any institution established, or society, for charitable purposes, wholly or principally maintained by voluntary contributions, and under the superintendence and control of any committee or governors or other person or persons chosen or appointed out of or by voluntary subscribers thereto; and that the application of any donation or bequest to the general purposes of any such institution, establishment, or society, in aid of such voluntary contributions, shall not be subject to the examination or interference of the commissioners appointed under this act: provided always, that the management and application of the rents and profits of any lands, tenements, or hereditaments belonging to such institution, establishment, or society for the period of twenty years or upwards before the passing of this act, shall in all such cases be subject to the examination of the said commissioners at their discretion.

except as to management and application of rents for twenty years.

Attorney general's certificate to be evidence of particulars of cases having been duly certified by commissioners.

XVIII. And be it enacted, that in all cases of proceedings instituted or to be instituted by his majesty's attorney general in pursuance of the said recited act of the fifty-ninth year of the reign of his late majesty King George the Third hereinbefore secondly mentioned, or of the said recited act of the second year of the reign of his present majesty, or of this act, the production to the court of a certificate under the hand of his majesty's attorney general, stating that the particulars of the case in question in writing have been certified to his majesty's attorney general for the time being, according to the provisions of the said recited acts of the fifty-ninth year of his said late majesty or of the second year of his present majesty, or of this act, as the case may be, shall be deemed sufficient evidence that such particulars have been duly certified to his majesty's attorney general accordingly, to and for all intents and purposes whatsoever.

Chief commissioner to superintend proceedings instituted by attorney general.

XIX. And be it enacted, that in all cases of proceedings instituted or to be instituted by his majesty's attorney general in pursuance of the before-recited acts, it shall and may be lawful for the said chief commissioner and he is hereby

directed to superintend all such proceedings, with a view to their prompt and effectual termination.

For empowering resident ministers and churchwardens to receive rent-charges belonging to charities, where no existing trustees.

XX. And be it enacted, that whenever it shall appear to the said commissioners to be appointed under the authority of this act that the property belonging to any charity consists only of one or more annuity or rent-charge, annuities or rent-charges, not exceeding in the whole the yearly sum of 50*l.* (*a*), and that there are no existing trustees or persons legally qualified to receive and give an effectual discharge for such annuity or rent-charge, annuities or rent-charges, it shall and may be lawful for any five of the said commissioners, by writing under their hands, to empower the resident minister and the churchwardens or chapelwardens for the time being of the parish or place interested in such charity, in case only one parish or place is so interested, but if more than one parish or place is so interested, then the resident minister and the churchwardens or chapelwardens of some one of the parishes or places interested, to receive the said annuity or rent-charge, annuities or rent-charges, or any arrears thereof, and to apply the same according to the purposes of the charitable donations or bequests thereof, in the same manner as the trustees of the said charity would have been bound to do; and the power so to be given to such minister and churchwardens or chapelwardens shall remain in force until trustees of the said charity duly appointed shall appear and claim the administration of the funds thereof, or until trustees of the said charity shall be appointed by the court of chancery or court of exchequer; and all receipts to be given by such minister and churchwardens or chapelwardens shall be effectual discharges to the persons liable to the payment of such annuities or rent-charges for all such sums as in such receipts shall be expressed to have been received in respect thereof; and in case of nonpayment of such annuities or rent-charges, or any arrears thereof, it shall and may be lawful for such minister and churchwardens or chapelwardens respectively, during the continuance of the power to be given to them by virtue of the provisions of this act, to use and exercise all such powers and remedies for recovering and compelling payment of the said annuities or rent-charges and the arrears thereof, as the trustees of the said charities respectively might or could have done if duly appointed.

Limitation of actions.

XXI. And be it enacted, that any action or suit which shall be brought against any commissioner or commissioners to be appointed under the authority of this act, or against any per-

(*a*) Any five of the commissioners appointed under the 1 & 2 Will. IV. c. 31, had a similar power given to them with respect to rent-charges not exceeding 20*l.* a-year, by 2 Will. IV. c. 57. *Ante*, pp. 316, 875.

5 & 6 Will. IV. c. 71.

son or persons acting under the authority or by the order of such commissioners, or any one or more of them, for any thing done or acted by him or them under this act, shall be commenced within six calendar months next after the fact committed in respect of which such action or suit shall be brought or commenced, and not afterwards; and the defendant or defendants in every such action or suit may plead the general issue, and give this act and the special matter in evidence at any trial to be had thereupon; and if such action or suit shall be brought or commenced after the time so limited for bringing the same, then the jury shall find a verdict for the defendant or defendants; and in such case, or if the jury shall find a verdict for the defendant or defendants upon the merits, or if the plaintiff or plaintiffs shall become nonsuit, or discontinue his, her, or their action after appearance, or if upon demurrer judgment shall be given against the plaintiff or plaintiffs, the defendant or defendants shall have treble costs, which he or they shall and may recover in such and the same manner as any defendant can by law in other cases.

General issue.

Treble costs.

Previously to presenting reports, commissioners may direct attorney general to file informations.

XXII. Provided always, and be it enacted, that previously to presenting any report the said commissioners shall give directions, in all cases in which they shall think it fit, to the attorney general to file informations in the courts of chancery or exchequer on the matter arising out of such reports, and shall not, nor shall any of the clerks or secretaries under this act, give any information touching any such matters to any person other than the attorney general or the persons employed by the said commissioners previous to the directions so by the said commissioners given to the attorney general.

Continuance of act.

XXIII. And be it enacted, that this act shall continue in force until the 1st day of March, 1837.

Act may be amended this session.

XXIV. And be it enacted, that this act may be amended, altered, or repealed by any act or acts to be passed in this present session of parliament.

TABLE OF STATUTES RELATING EXCLUSIVELY TO CHARITIES IN IRELAND.

3 George III. c. 16, Irish, s. 17.

Governors or trustees of charities under acts of parliament, may surrender on one month's notice in writing to the corporation, who may accept and proceed to the election of another governor or trustee in the place of the one resigning. 3 Geo. III. c. 16.

3 George III. c. 18, Irish, A. D. 1763.

An act for the better discovery of charitable donations and bequests, amended by 40 Geo. III. c. 75 (*b*). 3 Geo. III. c. 18.

28 George III. c. 15, Irish, A. D. 1788.

An act to enable the lord lieutenant or other chief governor or governors of this kingdom to appoint commissioners 28 Geo. III. c. 15.

(*b*) For the better discovery of charitable donations and bequests, it is provided by the Irish stat. 3 Geo. III. c. 18, that the vicar general or his surrogate, and the register of the prerogative shall make a return to the bishop of the diocese, or to the archbishop of *Armagh*, at the annual visitation, or between 25th of March and 24th June in every year, of every charitable donation or bequest contained in any will which shall be entered in the office of such vicar-general, &c., which return shall likewise contain the name of the testator, the names of the persons to whom probate of any such will, or letters of administration with such will annexed, shall be granted, with the date of such will, probate or administration; and copies of such returns, upon oath, shall be lodged with the secretary of commissioners of charitable donations and bequests (who are incorporated by the 40 Geo. III. c. 75, Irish), which copies shall be lodged between 1st July and 1st Nov. in every year; and every such officer who shall neglect to lodge such copy of such return with the secretary of the commissioners, shall forfeit 5*l.* to be recovered by any person who shall sue by civil bill before any judge of assize in their circuits, or before any assistant barrister at the general sessions of the peace, or before the recorder of *Dublin*, as the case may require; and executors or administrators are required within three calendar months to publish the charitable bequests in the *Gazette* three times successively.

28 Geo. III. c. 15. for inquiring into the several funds and revenues granted by public or private donations for the purposes of education in this kingdom, and into the state and condition of all schools in this kingdom on public or charitable foundations, and of the funds appropriated for the maintenance and support thereof, and for the other purposes herein mentioned. This act is revived and amended by 46 Geo. III. c. 122.

53 GEORGE III. c. 107, 10th July, 1813.

53 Geo. III. c. 107. AN act for the appointment of commissioners for the regulation of the several endowed schools of public and private foundation in Ireland. This act is amended by 3 Geo. IV. c. 79.

4 GEORGE IV. c. 32, 30th May, 1823.

4 Geo. IV. c. 32. AN act for the amendment of the laws respecting charitable loan societies in Ireland. This act is amended by 10 Geo. IV. c. 42.

& 3 WILLIAM IV. c. 85, 3 August, 1832.

2 & 3 Will. IV. c. 85. AN act to make a better provision for the superintendence of charitable institutions in Ireland, maintained in whole or in part by grand jury presentments, and for the more effectual audit of the accounts of the same.

PART II.

FORMS AND PRECEDENTS.

Form of License in Mortmain granted to a College in Oxford (*a*).

GEORGE the Fourth by the grace of God, &c.

To all to whom these presents shall come, greeting. Whereas M. I. R. clerk, doctor in divinity, president, and the scholars of the college of *St. Mary Magdalene*, in the university of *Oxford*, have by their petition humbly represented unto us that the said society, consisting of above one hundred persons upon the foundation, in which number are forty fellows and thirty demies, who are considered as in succession to fellowships, are but meanly provided with ecclesiastical preferments, whereto they might present the fellows, and thereby promote a succession in the college, possessing only thirty-six livings, by which fellowships are commonly vacated. The petitioners therefore most humbly pray that we would be pleased to grant them our royal letters patent for them and their successors to purchase, or receive, or hold in mortmain any lands, tenements, advowsons, or other hereditaments, not exceeding the yearly value of 4000*l*. Know ye therefore, that we of our especial grace, certain knowledge, and mere motion, have given and granted, and by these presents for us, our heirs and successors, do give and grant unto the said president and scholars of the college of *St. Mary Magdalene*, in the university of *Oxford*, and their successors, our especial license, full power, and lawful and absolute authority to purchase, or receive and hold in mortmain in perpetuity or otherwise, to or to the use of the said president and scholars and their successors, advowsons of ecclesiastical benefices, not exceeding in present value the yearly sum of 4000*l*. over and above their present possessions. And we do hereby also, for us, our heirs and successors, give and grant our especial license, full power, and lawful and absolute authority to any person or persons, bodies poli-

(*a*) *Ante*, pp. 39—41.

tic or corporate (otherwise competent), their heirs and successors, respectively, to grant, alien, sell, convey, and dispose of in mortmain in perpetuity or otherwise, to or to the use and benefit of or in trust for the said president and scholars and their successors, any advowsons of ecclesiastical benefices not exceeding in the whole in present value the yearly sum of 4000*l.* over and above their present possessions. And lastly, we do hereby, for us, our heirs and successors, grant unto the said president and scholars and their successors, that these our letters patent, or the enrolment or exemplification thereof, shall be in and by all things good, firm, valid, sufficient and effectual in the law, according to the true intent and meaning thereof, notwithstanding the not naming or describing any of the advowsons to be granted, aliened, sold, conveyed, or disposed of in mortmain as aforesaid, or any other omission, imperfection, defect, matter, cause or thing whatsoever to the contrary thereof in anywise notwithstanding. In witness, &c.

By writ of privy seal.

Forms of Informations respecting Charities (*b*).

Information *for the removal of the Master of a School, for the appointment of Trustees for the management of the School Property, and for the settlement of a scheme.*

In Chancery.

To the Right Honourable, &c. [*name and title of Lord Chancellor*] Lord High Chancellor of Great Britain.

Informing, showeth unto your lordship, ——— knight, his majesty's attorney general, by and at the relation of A. B., &c. &c., [*several relators*] (*c*), that by indentures of lease and release, bearing date respectively the tenth and eleventh days of July, 1663, and made between [*donor*], of the one part, and [*trustees*] of the other part, the said [*donor*] granted, released, and confirmed to the said [*trustees*], their heirs and assigns, divers manors, messuages, lands, and hereditaments therein particularly described, and amongst others, all the lands, tenements, and hereditaments of the said

Creation of charity.

(*b*) Although every information must necessarily be adapted to the particular circumstances of each case, it is conceived that some forms of general statements, which, with some variations, will be applicable to many cases, may be useful in a work of this kind. Some forms of informations will be found in the Equity Draftsman, Vol. I. 595—611, 2nd edit.; 2 Newl. Chanc. Pr. 83—90.

(*c*) See *ante*, pp. 424—428.

[*donor*] in [*names of parishes*] in the county of ———, to the use of the said [*trustees*] and their heirs, upon the several trusts thereby declared of the said estates respectively, and as, to, and concerning the lands in ——— aforesaid, to the use of the said [*trustees*] and their heirs, upon several trusts in them and their heirs reposed, that they should employ and dispose of the profits thereof yearly for the maintenance of a schoolmaster in ——— aforesaid, to teach and instruct the young children of the said parish of ———, such schoolmaster to be from time to time appointed by the heirs at law of the said [*donor*], as by the said indentures of lease and release when produced will appear. And his majesty's attorney general, at the relation aforesaid, further informeth your lordship, that the said [*donor*] duly made and executed his last will and testament in writing, bearing date, &c. and thereby, after noticing the death of his only son, under age, and that the said testator had since the death of his said son, by the said indentures of lease and release, conveyed his estates to and for such uses and purposes as were mentioned and declared in the said indentures or one of them, or should otherwise be declared by him by writing under his hand and seal, or by his last will and testament, to be testified by two or more witnesses, he by his said will in all points ratified and confirmed the uses and trusts declared in the said indenture of release, except as in the said will after mentioned, the said testator declaring the purport and scope of the said indentures to be, to settle the greatest part of his estates upon his daughters, being his heirs at law, and the residue on his brother ———, and for the maintenance and provision of a schoolmaster at the parish of ———, where the said testator was born, as by the said will when produced will appear. And his majesty's attorney general, at the relation aforesaid, further informeth your lordship, that after the decease of the said testator, his said will was proved in the prerogative court of the archbishop of *Canterbury*, on the 25th day of May, 1684, by ———, the daughters and executrixes, and also the coheirs of the said testator. And his majesty's attorney general, at the relation aforesaid, further informeth your lordship that the right of appointing the master of the said school at ——— aforesaid has been on several occasions exercised by the representatives of the family of [*the donor*], and R. E. of &c., Esq., one of the defendants hereinafter named, now is or claims to be patron of the said school. And his majesty's attorney general, at the relation aforesaid, further informeth your lordship, that, by deed poll, or instrument in writing, bearing date the 22nd day of June, 1808, under the hand and seal of the said R. E. described as heir-at-law of [*the donor*] heretofore of, &c., long since deceased, the said R. E. being therein further described as true

Will of donor.

Proof of will.

Patron of school.

Appointment of master.

and undoubted patron of the said school of ——— aforesaid, did thereby nominate and appoint W. S. of ——— aforesaid, doctor in physic (the other defendant hereinafter named) to be the master of the said school during the pleasure of the said R. E., in the room of the Rev. ———, the then late master thereof, who had been nominated by C. E., the father of the said R. E., as by the said deed poll or writing when produced will appear. And his majesty's attorney general, at the relation aforesaid, further informeth your lordship, that the said [*master*] was at the time of his said appointment to the said school a physician practising at ——— aforesaid, and he continued to practise in that capacity without devoting his time or attention to the duties of the said school, until the year 1827; since which time he has been confined to his house by illness. And his majesty's attorney general, at the relation aforesaid, further informeth your lordship, that the said [*master*] resides in a small house with a little garden attached to or belonging to the said charity, and that the school is held in a detached building in the garden, and that there is also a small close in the village, containing nearly half an acre, which, with a stable thereon, is occupied by the said [*master*], and the rest of the property belonging to the said charity consists of an estate in the township of *Hough*, comprising a small farm-house and outbuildings, and several closes of land, containing altogether 76 acres, let to one E. H., at a yearly rent of 200*l*., and that the farm buildings, as well as the school premises, are in bad condition, and that there is a lime-kiln on the estate, from which no profit is now derived, and a shaft for winning coals, and that the colliery is let to Messrs. H. & Co., who have agreed to pay 2*d*. a fother for all the coal to be raised by them, and that there is also on the estate some clay which is used for making crucibles for glass-houses, and the same parties have agreed to pay 1*s*. 6*d*. per ton for the quantity they may take. And the management and letting of the property belonging to the charity have been left to the schoolmaster alone. And his majesty's attorney general, at the relation aforesaid, further informeth your lordship, that the said [*master*], from the time of his appointment in 1808, till the commencement of his illness in the year 1827, rarely attended the school, but left the management thereof to an usher, and for some time past the said usher had the whole care of the school until the spring of 1829, when he was dismissed, and thereupon a son of the said [*master*] then in his nineteenth year, was appointed usher of the said school by the said master, with the same salary and emoluments as the usher had received, *viz*., 19*l*. a-year, with board, washing, and lodging. And his majesty's attorney general, at the relation aforesaid, further informeth your lordship, that, except when the said [*master*] has occasion-

Master a practising physician.

Particulars of property belonging to the charity.

Neglect of school by master.

ally received the children at his house and examined them, he has not otherwise personally acted in the conduct or management of the said school. And his majesty's attorney general, at the relation aforesaid, further informeth your lordship, that the school is open to all the children, boys and girls, of the poor of the said parish of ———, who are taught reading, writing, and accounts, free from any charge, but they provide their own books, and pay 2*d.* each for coals in winter. And his majesty's attorney general, at the relation aforesaid, further informeth your lordship, that, owing to the neglect of the said schoolmaster, the attendance of scholars is very irregular, that in winter the average number is between sixty and seventy, and in summer between thirty and forty; and that the last master, the said R. B., held the said school many years, during which time he had several scholars who received classical instruction, but since the appointment of the said [*master*], there have been no scholars of this description. And his majesty's attorney general, at the relation aforesaid, submits that the appointment of a practising physician, as master of the said school, was highly improper, and has been of considerable injury to the welfare of the said charity, and that the mode in which the school has been and is conducted by the said [*master*] is detrimental to the interests of the said charity, and contrary to the intentions of the founder thereof. And the attorney general submits, that the said master ought therefore to be removed from the situation of master of the said school. And his majesty's attorney general, at the relation aforesaid, charges that the benefits at present derived by the said parish of ——— from the said charity are greatly inadequate to the income of the said charity property; and that the master ought not merely to superintend the school occasionally, but to employ himself regularly in giving personal instruction therein; and that trustees ought to be appointed, in whom the charity property should be vested, and by whom the same should be let and managed; and that proper rules should be established for the future regulation of the said charity and disposal of the revenues thereof; and applications have been made to the said [*master*] to give up the mastership of the said school and the possession of the charity property; and to the said R. E. to take steps for removing the said [*master*] from the said mastership, and to appoint some proper person to be master in his room, and to concur in such measures as may be necessary for placing the said charity on a proper footing in future. But the said master and R. E. confederating together, and with divers persons, to the attorney general or the relators at present unknown, whose names when discovered the attorney general, on behalf of the said testators, prays may be inserted herein,

Charges.

with proper matter and words to charge them as parties defendants hereto, refuse to comply with such applications, the said defendant [*master*] pretending that he hath always devoted his whole time and attention to the said school, except when prevented by illness; and in particular the said last-named defendant pretends, that during the greater part of the years 1827, 1828, and 1829, he was in a very bad state of health, and unable to attend to the duties of the said school, but that before and since that period he has been constant in his attention thereto, whereas the said attorney general, at the relation aforesaid, charges the contrary to be the truth; and that the said defendant [*master*] has never acted as master of the said school save when he has occasionally examined the boys as aforesaid since he recovered from his said alleged illness, but the said defendant has received all the rents and profits of the said school property, and by his neglect suffered the said school to fall into utter decay. And the attorney general, at the relation aforesaid, submits, that some proper and fit person, who will devote his whole time and attention to the care and conduct of the said school ought to be appointed in the room of the said defendant [*master*], and so the said defendant R. E. will at times admit, but then he pretends that he cannot remove the said defendant [*master*] unless by the order of this court. And his majesty's attorney general, at the relation aforesaid, charges that the said [*master*] and R. E. have in their or one of their possession, or power, divers deeds, wills, accounts, letters, papers, and writings relating to the matters aforesaid, from which the truth of the matters aforesaid would appear, and that they ought to produce the same; all which actings and pretences of the said defendants are contrary to equity, and tend to the manifest wrong and injury of the said charity; in tender consideration whereof, and inasmuch as the said charity is remediless at and by the strict rules of common law, and only relievable in a court of equity, where matters of this kind are properly cognizable and relievable. To the end, therefore, that the said [*master*] and R. E., and their confederates, when discovered, may, upon their respective corporal oaths, to the best and utmost of their respective knowledge, remembrance, information and belief, full, true, direct and perfect answer make to all and singular the matters aforesaid, as fully and particularly as if the same were hereinafter repeated, and they thereunto distinctly interrogated; and more especially that they may answer and set forth, whether such indentures of lease and release as are hereinbefore mentioned to bear date the 10th and 11th days July, 1663, were not made and executed between and by such parties, and to such purport and effect as hereinbefore in that behalf mentioned, or some other and what indentures of some other and what dates

Interrogatories.

between some other and what parties to some such or some other and what purport or effect; and whether the said [*testator*] did not duly make and execute his last will and testament in writing in part to such purport and effect as hereinbefore in that behalf mentioned, or to some such or some other and what purport or effect; and whether, after the decease of the said testator, and at or about the time hereinbefore in that behalf mentioned, or when else, the said will was not proved in the prerogative court of the archbishop of *Canterbury*, or in some other and what ecclesiastical court, by the several persons hereinbefore in that behalf mentioned as the executrixes thereof, or by whom else; and whether such executrixes were not the daughters and coheiresses of the said testator; and whether the right of appointing the master of the said school at —— has not been on several or some and what occasions exercised by the representatives of the family of the said [*donor*], or by whom else; and whether the said defendant R. E. is not, or whether he does not, claim to be patron of the said school; and whether such deed poll or instrument in writing, as is hereinbefore mentioned to bear date the 22d day of June, 1808, was not made and executed by the said defendant R. E. to such purport and effect as hereinbefore in that behalf mentioned, or some other and what deed poll or instrument in writing, of some other and what date, executed by some other and what person, and to some such or some other and what purport or effect; and whether the said [*master*] was not at the time of his said appointment to the said school a physician practising at —— aforesaid, or how otherwise; and whether he did not continue to practise in that capacity, or how otherwise; and whether or not without devoting his time and attention to the duties of the said school until the year 1827, or till some other and what time; and whether since that or some other and what time he has not been confined to his house by illness; and whether he does not reside in a small house, with a little garden attached to it, belonging to the said charity, or how otherwise; and whether the school is not held in a detached building in the said garden, or where else; and whether there is not also a small close in the village, containing half an acre, or some other and what quantity, with a stable thereon, belonging to the said charity, and occupied by the said [*master*], or how otherwise; and whether the rest of the charity property does not consist of the several particulars hereinbefore in that behalf mentioned, or of some other and what particulars; and whether the same is not let to the several persons, at such yearly and other rents or other payments to be made for the same, as are hereinbefore in that be-

half mentioned, or how otherwise, and what is the amount of the income derived from the same; and whether the farm buildings in the said township of *Hough*, as well as the said school premises, or some and which of them are not in bad condition, or how otherwise; and whether the management and letting of the said property belonging to the said charity has not been for some and what period left to the schoolmaster alone, or how otherwise; and whether the said defendant [*master*] from the time of his appointment in the year 1808, till the commencement of his illness in the year 1827, or from some other and what time to some other and what time, did not rarely attend the said school; and whether he did not leave the management thereof to an usher; and whether for some years past, or for some and what time the said usher had not the whole care of the school until the spring of 1829, or some other and what time, or how otherwise; and whether the said usher was not then, or at some other and what time dismissed; and whether thereupon, or upon some other and what occasion, a son of the said defendant [*the master*] was not appointed by him usher of the said school, with such salary and emoluments as are hereinbefore in that behalf mentioned, or some other and what salary and emoluments; and whether they were not the same as the former usher had received; and whether the said son of the said [*master*] was not at the time of such appointment in his nineteenth year, or how old was he; and whether the said [*master*] has personally acted in the conduct or management of the said school except by occasionally receiving the children at his house and examining them, or how otherwise; and whether the said school is not open to all the children, boys and girls, of the poor of the said parish of ——— or how otherwise; and whether they are not taught reading, writing and accounts free from any charge, or how otherwise; and whether they do not provide their own books, and pay 2*d.* each for coals in winter, or how otherwise; and whether, owing to the neglect of the schoolmaster, or to some other and what cause, the attendance of scholars is not very irregular; and whether in winter the average number is not between sixty and seventy, and in summer between thirty and forty, or what are the average number of such scholars; and whether the said [*late master*] was not the last master of the said school, and whether he did not hold the same many and how many years; and whether during that time, or some and what part thereof, he had not several scholars who received classical instruction, and whether since the appointment of the said [*master*] there have been any scholars of that description; and whether the appointment of a practising physician

as master of the said school was not highly improper; and whether the same has not been of considerable injury to the welfare of the said charity, or how otherwise; and whether the mode in which the said school has been and is conducted by the said defendant [*master*] is not detrimental to the interests of the said charity, and contrary to the intentions of the founder thereof, or how otherwise; and whether the said [*master*] ought not to be removed from the situation of master of the said school; and whether the benefits at present derived by the said parish of ——— from the said charity are not greatly, or in some and what degree, inadequate to the income of the said charity property; and whether the said [*master*] ought merely to superintend the school occasionally, and whether he ought not to employ himself regularly in giving personal instruction therein; and whether trustees ought not to be appointed in whom the charity property may be vested, and by whom the same should be let and managed, or if not, why not; and whether proper rules should not be established for the future regulation of the said charity and disposal of the revenues thereof, or if not, why not; and whether such applications as are hereinbefore in that behalf mentioned have not been made to the said defendants respectively, and whether they have not severally declined to comply therewith, and for what reason; and whether the said defendant [*master*] has ever acted as master of the said school, save as hereinbefore in that behalf mentioned, since he recovered from his alleged illness; and whether he has not received all the rents and profits of the said school property; and whether by his neglect, or by what other means, he has not suffered the said school to fall into utter decay, or how otherwise; and whether some proper and fit person, who will devote his whole time and attention to the care and conduct of the said school, ought not to be appointed in the room of the said defendant [*master*]; and whether the said defendant R. E. cannot, and whether he ought not to remove the said defendant [*master*], or if not, why not; and whether the said defendants [*master*] and R. E., or one and which of them, have not or hath not in their or his possession or power divers or some and what deeds or a deed, wills or a will, accounts or an account, letters or a letter, papers or a paper, and writings or a writing, relating to the several or some or one and which of the matters aforesaid; and that they may set forth a list or schedule thereof, and leave the same in the hands of their clerk in court for the usual purposes; and whether the said defendants respectively have or hath now in their or his possession or power all such of the aforesaid particulars as at any time have or

hath been in their or his possession or power, or if not, then that they or he may set forth what is become thereof, and in whose possession or power the same were when they or he last saw or heard of the same respectively. And that the said defendants may answer the matters aforesaid; and that the said [*master*] may be removed from the mastership of the said school, and that some proper person may be appointed master thereof in his stead; and that the said charity may be established; and that it may be referred to one of the masters of this honourable court to appoint proper persons to be trustees thereof; and that directions may be given for vesting in them the property belonging to the said charity, and that all necessary parties may be ordered to join in such conveyance; and that a scheme may be settled for the future management of the said property and regulation of the said charity; and that your lordship will be pleased to make such further or other decree in the premises as the interests of the said charity may require. May it please your lordship to grant unto his majesty's attorney general his majesty's most gracious writs of subpœna, to be directed to the said [*master*] and R. E., and the rest of their confederates when discovered, thereby commanding them and every of them, at a day and under a pain therein to be limited, personally to be and appear before your lordship in this honourable court, then and there true, direct, and perfect answer to make to all and singular the matters aforesaid; and to stand to, perform and abide such order and decree therein as to your lordship shall seem meet.

Prayer.

INFORMATION *filed at the instance of the Charity Commissioners* (*d*) *for setting aside a Reversionary Lease of a Charity Estate for* 500 *Years, and for an Account of the Rents and Profits beyond the Rent Reserved.*

IN CHANCERY.

To, &c.

That, &c. [*statement of conveyance, dated December*, 1668, *of a rectory, manor, lands and other hereditaments to eight trustees for charitable purposes—ante, pp.* 561, 562.] And his majesty's attorney general further shows, that by divers conveyances, the said premises have been from time to time conveyed to and vested in new trustees upon the trusts

Present trustees of the charity.

(*d*) *Ante*, pp. 428—430.

declared concerning the same, by the said deed of trust, and that ultimately by an indenture, bearing date, &c. the said premises were conveyed to the use of [*trustees*], upon the trusts aforesaid, and they are the present trustees of the said charity. And his majesty's attorney general further informeth your lordship, that the said —— as the only surviving trustee under the said indenture of [*deed of gift*] by indenture, bearing date the 20th day of November, 1696, demised to the said —— his executors, administrators, and assigns, the premises aforesaid, to hold the same from the expiration of the said term of ninety-nine years for the term of 500 years, at the old rent of 40*l.* *per annum*, which rent was then greatly below the value of the said premises. And his majesty's attorney general further informeth your lordship, that the said [*lessee*] was the son-in-law of the said [*trustee*], and that it so appears in certain old deeds in the possession of the defendants hereafter named, and that the said lease was granted by the said [*trustee*] in order to benefit his own family at the expense of the charity. And his majesty's attorney general further showeth unto your lordship, that the said term of ninety-nine years having expired, the said reversionary term of 500 years hath fallen into possession, and the same by divers assignments and other acts in the law hath become and is now vested in [*some of the defendants*] or some person in trust for them, or one of them, and they are and for some time past have been respectively in possession of the said rectory, lands and premises under the said demise, and have, or one of them hath paid unto the said trustees of the said charity for the time being the said annual rent of 40*l.* And his majesty's attorney general further informeth your lordship, that [*donor's sister (named in the deed of gift) and all her children have been long dead*] and that the said rent of 40*l.* has been or is applied by the trustees of the said charity to the charitable purposes directed by the said indenture of [*deed of gift*]. And his majesty's attorney general further informeth your lordship, that the said reversionary lease for 500 years was an improper and improvident lease, granted at a very inadequate rent, and without any consideration being paid for the same, and that the grant of such lease was a breach of trust by the said [*trustee*] as such trustee as aforesaid, to which the lessee was party or privy. And his majesty's attorney general further informeth your lordship, that the particulars of this case have been certified to him by the commissioners for inquiring concerning charities in England, according to the provisions of the act of parliament passed in the fifty-ninth year of the reign of his late majesty King George the Third, entitled "*An Act for giving additional facilities in applications to Courts of Equity regarding the*

Grant of reversionary lease.

Lessee son-in-law of trustee.

That lease had come into possession and vested in defendants.

That lease was improvident.

That particulars had been certified.

Management of Estates or Funds belonging to Charities."

Charge as to value of property. And his majesty's attorney general charges that the present annual value of the said rectory, manor, lands, and other hereditaments is very great, independent of the advowson of the said vicarage, and that it would so appear if the defendants would set forth the particulars of which the said hereditaments consist, and what is the present annual value of such part thereof, and how they compute the same, and what has been the gross income, and what has been the net income received from the same, since they have been in possession thereof.

That lease was a breach of trust. And his majesty's attorney general submits that the said demise of the —— day of —— was made by the said [*trustee*] in breach of his duty as a trustee of the said charity, and that the lease ought to be set aside, and that the said [*defendants*] ought to account for the monies received by them respectively, from or on account of the rents and profits of the said premises, after deducting the said rent of 40*l.*, so by them or one of them annually paid as aforesaid.

Charges. But now so it is, may it please your lordship that the said [*defendants*] contriving and confederating to and with the said [*trustees of the charity*], and with divers other persons at present unknown to the said attorney general, but whose names, when discovered, the said attorney general prays may be inserted herein, and they made parties defendants hereto, with proper and apt words and matter to charge them, and contriving to defraud the said charity, refuse to comply with such requests, and sometimes pretending that they, or those under whom they claim, purchased the said term of 500 years without any knowledge that the same had been granted by a trustee for charitable purposes, whereas the attorney general charges the contrary; and that if the said lease was purchased by the said defendants [*naming them*], or any person through whom they or he claim or claims for valuable consideration, which the attorney general does not admit, the attorney general charges that such purchaser had notice at the time that the person by whom the said term was granted was a trustee of the said lands for charitable purposes, and that in fact it so appears upon the deed granting the said term; and in fact the attorney general charges that the said rent of 40*l.* was at the time of the said purchase regularly applied to charitable purposes, and was frequently paid over by the lessees themselves in the first instance to —— [*the object of the charity*] instead of being paid over to the trustees of the said charity. [*There were other charges and that defendants had deeds, &c. in their possession*]. All which, &c. [*ante*, p. 896.] To the end therefore, &c. [*interrogatories adapted to the previous statements and charges.*]

Prayer. And that the said defendants may

answer the premises and that the said demise for the term of 500 years of the said charity estates may be declared to have been a breach of trust by the surviving trustee of the said charity; and that the same may be decreed to be surrendered; and that the said defendants may be decreed to deliver up the said indenture of [*date*] to be cancelled; and that an account may be taken of the rents and profits of the said charity estates, which have been received by the said defendants, or either of them, and that what they or he shall appear to have received (after deducting the sum of *l.* for each year) in respect of the rents and profits of the said estates may be paid over to the said trustees to be applied according to the trusts of the said indenture of [*date*], or that such further and other decree may be made in the premises as the rights and interests of the charity may require.

SOME STATEMENTS *and Charges in, and Prayer of an Information for the Establishment of a Charity for the Poor of a Parish, and for the due administration of the Funds thereof, and for setting aside a Lease, and for an Injunction to restrain the Trustees from granting Leases on Fines of other parts of the Charity Property.*

AND his majesty's attorney general further informeth your lordship, that the said [*defendants*] are the survivors of the trustees named in the last stated indenture, and that the said trust premises are now vested in them, and the attorney general has set forth in the schedule to this information annexed, the particulars of the property vested in the said trustees upon the charitable trust aforesaid, with the annual value thereof, and the leases on which the same was held in the year 1821 at the time of the inquiry by the commissioners for inquiring concerning charities. And his majesty's attorney general further informeth your lordship, that the trustees of the said lands have been accustomed for many years to grant leases of the said lands and tenements so vested in them as aforesaid for twenty-one years, at very low rents, and to renew the said leases at the old rents at the end of seven or fourteen years, upon payment of a fine professed to be calculated upon and to be equal to one year's rent of the premises comprised in the lease according to the actual value, but which, in fact, is usually much below one year's value, by reason whereof the said premises do not produce to the said charity any thing like the full or fair value; and the same previously to the renewal in the year 1826 of the lease hereinafter stated, were let at rents amounting in all to 3*l.* 10*s.* *per annum*, and

Particulars of property set forth in schedule.

Mode of leasing.

the amount of all the fines paid upon the last renewals of the said leases previous to the renewal in the year 1826, was only 286*l.*, whereas the real annual value of the said premises to be let, was and is 400*l. per annum*. And his majesty's attorney general further informeth your lordship, that the whole amount both of the fines and of the rents received from the said premises, has been and is paid by the trustees in aid of the churchwarden's account of the said parish, and no part thereof is applied in aid of the poor of the said parish, whereas a fair proportion of the said rents and fines, or at all events of the said rents, ought to have been applied and ought hereafter to be applied to the relief of inhabitants of the said parish not receiving parochial relief.

Improper application of rents.

[*That Notice had been given to Trustees and Lessees that Proceedings would be taken for setting aside the Leases, that none of the Leases had been surrendered, and that a Renewal had been effected since such Notice, &c. &c.*]

That lease had been renewed at under value.

And his majesty's attorney general further informeth your lordship, that such renewal has been granted upon grossly low and inadequate terms, and after such notice as is hereinbefore mentioned had been given on the part of the attorney general, both to the lessees of the said premises and to the trustees thereof, and that such lease ought, as the attorney general submits, to be set aside, upon such terms as may appear to this honourable court to be reasonable. And the attorney general submits, that proper directions ought to be given for the administration of the said charity, and that the leases subsisting upon the property ought not to be renewed before the expiration thereof, and that new leases ought to be granted when and as the old leases fall in at rack rents, or if any renewals are made upon payment of fines, then a proper proportion of the consideration for the leases ought to be reserved by way of rent, and that a proper portion of the proceeds of the said charity estate ought to be applied to the relief of poor inhabitants of the said parish not receiving parish relief. But now, &c. [*ante*, p. 902,] that the said trustees object to any alteration in the present mode of administering the said charity, and the said [*lessees*] insist upon the validity of the said new lease, and allege that the same was granted upon fair and reasonable terms between landlord and tenant, or that by reason of some large expenditure upon the said premises they the said [*lessees*] had an equitable claim to a renewed lease of the said premises, upon such advantageous terms as were actually thereby granted to them, whereas the attorney general charges the contrary of all such to be true, and that such lease was improperly granted on very low and unreasonable terms, greatly to the prejudice of the said charity, and that the fine paid, and rent reserved as the consideration for the said

How leases ought to be granted.

Charges.

lease, are greatly below the fair value of the said premises, even supposing the prior lease under which the said premises were held, and which was surrendered upon the new lease being granted, to have been a valid and unimpeachable lease; but in fact the attorney general charges that such former lease was not a valid lease, and ought not to have been so treated or considered by the said trustees. And the said attorney general charges, that no expenditure had been made upon the said premises by the said [*lessees*] to warrant the granting either of the new lease or of the former lease on the terms on which the same were granted, and that no expenditure had been made by them or by the said [ ] or the person under whom he claims a beneficial interest in the said premises beyond such as they respectively were bound to make or would have made as tenants for twenty-one years at a fair rent; and so the attorney general charges, it would appear if the said defendants [*naming them*] if they shall pretend that any such expenditure was made, would set forth when the same was made and the amount and particulars thereof, and how and in what manner and to what extent the said demised premises were permanently improved or increased in value by reason of such expenditure. And the attorney general charges, that the granting the said new lease was a breach of trust on the part of the said trustees, and that the said defendants, the lessees, and ——— were parties to such breach of trust, and that the lease ought to be set aside and cancelled. And the attorney general charges, that the said defendants respectively have in their possession or power the said lease and counterpart, and the inquisitions and decrees hereinbefore mentioned or copies thereof, and divers deeds, books, receipts, papers, and writings relating to the several premises hereinbefore mentioned, but that they refuse to produce the same. To the end, &c. [*ante*, p. 896, *interrogatories adapted to the statements and charges.*] And that the said defendants may answer the premises, and that proper directions may be given for the establishment of the said charity and the due administration of the funds thereof; and that a fair proportion of the rents and profits of the said charity estates may be applied to the relief of poor inhabitants of the said parish of ——— not receiving parochial relief; and that such account may be directed to be taken as the court may think proper, of the receipts and payments of the said defendants, the trustees of the said charity estates for the time past; and that the said lease to the said —— [*names of lessees*] of the [*date*] may be set aside, and that the same may be delivered up by them to be cancelled; and that it may be declared that the existing leases of the said charity estates ought not to be renewed be- Prayer.

fore the expiration thereof, and that the premises ought to be let at their full value, and that the defendants [*the trustees*] may be restrained by the injunction of the court from renewing such leases, or if it shall appear to the court that the said leases ought to be renewed, or that the same ought to be granted upon fines, then that a proper proportion of the consideration may be reserved by way of rent, and that the full value of such new leases may be secured to the charity and duly applied. And [*for further relief.*]

PRAYER *of an Information to reform Abuses in the Management of the Charity Property, for removing Trustees, and for the settlement of a Scheme.*

THAT proper directions may be given under the decree of this honourable court for the due administration of the said charity, according to the decree of the said commissioners of charitable uses, with such alterations as may be necessary. And that the said defendants may be removed from being trustees of the said charity. And that proper persons to be trustees of the said charity, not being tenants thereof, may be appointed by this honourable court or be elected by the inhabitants of——— according to the aforesaid decree. And that proper measures may be taken for vesting the lands of the said charity in the persons so to be appointed. And that the lands of the said charity may be let at their full value, and that in letting the same, due means may be taken for securing and enforcing the payment of the rent. And that it may be referred to one of the masters of this court to approve of a proper scheme for the purposes aforesaid, and for applying the increased income of the said charity to the purposes thereof, and that in the mean time some proper person may be appointed to receive the rents and profits of the said charity estates with all usual directions. And, &c. [*for further relief.*]

STATEMENTS *and Charges in, and Prayer of Information against the Select Vestrymen, Parish Officers, and Feoffees of a Parish, for the establishment of several Charities, and decision on the Claims of such Charities to certain Property which had been purchased with Charitable Bequests, for an account of Fines, and for a Scheme for the application of the Rents and Profits.*

[*Statement of a gift of* 20*l. to remain as a stock for the poor of a parish to be disposed of in bread or otherwise, at the discretion of the churchwardens, overseers of the poor, and vestrymen of the parish, and of three gifts of money, the interest to be paid yearly to the poor for ever*]. And the attorney general further informeth your lordship, that in the year 1653 the churchwardens and overseers of the poor of the said parish, laid out the said donations aforesaid, amounting to the sum of 73*l.* 6*s.* 8*d.* together with the further sum of 26*l.* 13*s.* 4*d.* advanced for that purpose out of the general funds of the said parish, such funds amounting together to 100*l.*, in the purchase of a messuage and two acres of ground hereinafter mentioned, and, accordingly, by an indenture, dated 20th day of December, 1653 [*conveyance of property to several parishioners in fee, subject to certain leases whereon the rent of* 7*l.* 10*s. was reserved*]. That gifts were invested in the purchase of lands.

And the attorney general further informeth your lordship, that the trustees of the said charity paid over the rents of the said premises, amounting to 7*l.* 10*s. per annum*, to the churchwardens and overseers of the poor of the said parish, who applied 1*s.* weekly, amounting together to 4*l.* 2*s.* 4*d. per annum*, in the distribution of bread to the poor of the said parish, on account of the said several charitable donations, and the residue of the said rents they applied in repaying to the said parish the said sum of 26*l.* 13*s.* 4*d.* advanced on account of the said purchase as aforesaid, by means whereof previously to the year 1668, the whole of the said sum had been paid off, and the property so purchased as aforesaid, became and was subject only to the charitable purposes declared by the several wills hereinbefore mentioned, concerning the said several charitable donations. And the attorney general, &c. [*statement that property in question had been conveyed in* 1668, *to trustees, and from time to time to new trustees, and was then vested in the defendants*]. And the said attorney general further informeth your lordship, that the trustees for the time being of the said premises purchased with the charitable bequests hereinbefore particularly stated, have with the consent and under the direction of the churchwardens and overseers and vestrymen of the said parish of —— ever since the purchase of the said premises been in the habit of granting leases for lives of the premises, which have been renewed from time to time, at little more than the old rent, upon payment of fines as the lives have dropped in, and the churchwardens, or the senior churchwarden for the time being, by the consent and permission of the trustees, have received the rents of the said premises, and have at divers times received certain large That sum advanced by parish had been repaid. Mode in which leases had been granted.

sums of money for such fines as aforesaid, amounting in the whole to the sum of 3894*l.* And the said attorney general further informeth your lordship, that the said premises at present consist of a distillery and various buildings connected therewith, and of an iron foundry and buildings connected therewith, and the same are let upon three leases at rents amounting to 8*l.* 10*s. per annum*, but the said premises are now of the annual value of 520*l.*

That rents had been reduced.

And the attorney general further informeth your lordship, that the rents of 7*l.* 10*s.* reserved upon the said premises at the time of the original purchase thereof, for the benefit of the said charity, became by some means reduced some years after the said purchase to 7*l. per annum*, at which sum the same continued up to the year 1766 and for some years afterwards, and the parish of ——— being entitled to other funds of which the increase was to be applied in the distribution of bread to the poor of the parish, the distribution made on account of the different charities became and was for many years confounded; but in the year 1766, the churchwardens, overseers, and vestrymen of the said parish caused an investigation to be made into the different charities, and the property belonging to each to be distinguished, and upon that occasion the sum of 7*l. per annum*, being the rent of the premises hereinbefore mentioned, was attributed to the charities of [*the donors*]; and in the year 1776, in an account made out by the vestry of the said parish, of their charitable funds entitled donations deposited with the vestry of ——— parish, the income to be applied for the poor in bread for ever, one item is "Renewals of the estate bought of ———" being the property hereinbefore mentioned. And the attorney general further informeth your lordship, that the said churchwardens and overseers have continued to distribute the said sum of 7*l. per annum*, in bread, on account of the several charities hereinbefore mentioned, but they have applied all the fines received upon the renewals of the leases, and the residue of the said rents, to the use of the said parish as part of the general funds thereof, and in particular towards maintaining, repairing and beautifying an ancient church in the said parish, and in the maintenance of a pipe or conduit for supplying the said parish with water. And the said attorney general further informeth your lordship, that A. & B. are, and have for some time past been the churchwardens of the said parish of ———, and C. & D. have been for some time past and now are, the overseers of the poor of the said parish.

That only a small part of rents had been applied to charities.

Who are the present churchwardens.

That rents ought to be applied to charities.

And the attorney general submits that the whole rents and profits of the said premises so purchased as aforesaid, in-

cluding the fines, ought to be applied to the charitable purposes to which the monies hereinbefore mentioned to have been invested in the purchase thereof were applicable. [*Charge that defendants*] " refuse to alter the present appli- Charges.
cation of the profits of the said premises, pretending that the premises in question belong to and are the property of the said parish, subject only to the payment of an annual sum of 7*l.* by weekly payments, for the benefit of the poor of the parish in respect of the charitable bequests hereinbefore mentioned; whereas the attorney general charges the contrary of all such pretences to be true, and that the said premises belong to and are subject to the charitable trusts declared by the several wills hereinbefore mentioned, and that the rents and profits thereof ought to be applied accordingly; for if the whole of the said property do not belong to the said charities, then the attorney general charges that such proportion of the said premises ought to be considered to belong to the said charities, as the funds originally contributed by the said charities to the purchase of the said premises, bears to the whole of the purchase money. And the attorney general charges that the defendants or some of them have received, and have now in their hands, large sums of money in respect of fines received for renewals of leases of the said premises, for which they ought to account to the said charities. [*Charge as to deeds, &c. Interrogatories.*]

That the said defendants may answer the premises; and Prayer.
that the several charities hereinbefore mentioned may be established; and that the premises comprised in the said indenture [*deed of conveyance*] may be declared to belong to the said several charities, and to be subject to the trusts thereof; and if this honourable court should be of opinion that the entirety of the said premises is not subject to the said charitable trusts, then that such proportion of the rents and profits of the said premises may be declared to be applicable to the said charitable trusts, as the funds contributed by the said charities to the purchase of the said premises bears to the whole amount of the purchase money. And that an account may be taken of the monies received by the defendants or any of them and now in their hands, in respect of fines or other profits of the said premises, and that the same may be applied to the charitable purposes aforesaid; and that it may be referred to one of the masters of the court to approve of a scheme for the due application of the rents and profits of the premises aforesaid, according to the purpose and intention of the said benefactors. And [*for further relief*] (*e*).

(*e*) *Attorney General* v. *Brickdale and others.* In this case a decree was made on 29th January, 1830, declaring that the property in

INFORMATION *for the recovery of a Rent Charge against the Owners of the Lands charged therewith, and the Trustees to whom the distribution of it was given* (*f*).

IN CHANCERY.

To, &c.

STATEMENTS

Informing, showeth unto your lordship, Sir ——— knight, his majesty's attorney general, [*or* by and at the relation of (*names of relators*)] that A. B. being at the date of his will hereinafter mentioned, and at the time of his death, seised in fee of the lands hereinafter mentioned, by his will, bearing date on or about the 21st day of January, 1733, executed and attested as is by law required to pass freehold estates by devise, gave and devised unto his nephew B. B. his heirs and assigns for ever, all his the said testator's freehold estates lying within the precincts of B. & O. in the county of *Bucks*, upon condition that his said nephew B. B. his heirs and assigns, should pay or cause to be paid to the churchwardens and overseer of the poor of D. in the said county, out of the rents and profits of the said estate, the sum of 10*l.* yearly, on Easter Monday, to be laid out by them for and towards the clothing of four poor persons belonging to D. aforesaid, either men or women, or both, according as the churchwarden and overseer for the time being should find most occasion, but not to any person as received collection; and the said testator charged that his whole estate with the payment thereof for ever, as by reference to the said will when produced will more fully appear.

of will giving rent charge to charity.

And his majesty's attorney general [*or* at the relation aforesaid] further showeth unto your lordship, that the said testator died soon after the date of his said will, and that the sum of (*l.* being deducted from the said annual rent charge of 10*l.* on account of land tax,) was regularly paid by the proprietor of the said lands for the time being, on account and for the benefit of the said charity, from the death of the said testator until the year 1812, since which time no payment whatever has been made on account thereof. And his majesty's attorney general [*or* at the relation aforesaid]

Death of testator and payment of rent charge.

Particulars of estate subject to rent charge.

question of the annual value of about 580*l.* belonged to the charities in respect of which 7*l.* *per annum* only had been applied, and directing an inquiry as to the expediency of selling the property. See *ante*, p. 688, n. (*x*). And if the master should disapprove a sale, then directing the settlement of a scheme for the management and letting of the estate in future, the costs of the suit to be paid out of the charity funds.

(*f*) As to the necessary parties to a suit of this kind, see *ante*, pp. 433—437.

further showeth unto your lordship, that the lands charged by the said will with the payment of the said annuity or rent charge, consist of a close of land within the precinct of B. in the county of *Bucks*, containing five acres or thereabouts, and of a cottage and other buildings, and several closes of land containing twelve acres or thereabouts, lying within the precinct of O. in the said county of *Bucks*. And his majesty's attorney general [*or* at the relation aforesaid] further informeth your lordship, that all the said lands were, previously to the year 1812, the property of one C. C. and that in the year 1812, the said C. C. sold the said close within the precinct of B. to D. D. of B. aforesaid, farmer, and conveyed the same to him, and at the same time gave him a bond to indemnify him against the payment of the said rent charge; and the said D. D. entered into possession of the said close, and shortly afterwards duly conveyed the same to E. E. one of the defendants hereinafter named, who married the daughter of the said D. D., and the said E. E. thereupon entered into possession of the said land, and has ever since been in the possession thereof. And his majesty's attorney general [*or* at the relation aforesaid] further informeth your lordship, that the said C. C. died soon after the said sale, and thereupon by descent or devise from him E. C. his brother, another of the defendants hereinafter named, became seised of the said lands within the precinct of O. and entered into possession thereof, and has ever since been in such possession. And the attorney general [*or* at the relation aforesaid] further informeth your lordship, that each of them the said E. C. and E. E. has received from the said lands belonging to him since he has been in possession thereof, greatly more than sufficient to satisfy the whole of the said rent charge of 10*l.* *per annum*.

Title to lands charged shown.

Rents of lands more than sufficient to pay rent charge.

And his majesty's attorney general further informeth your lordship, that the particulars of this case were some time since certified to him by the commissioners for inquiring concerning charities in *England*, according to the provision of a certain act of parliment made and passed in the 59th year of his late majesty King George the Third, intituled "*An act for giving additional facilities in applications to Courts of Equity regarding the management of Estates and Funds belonging to Charities*" (*g*). And [*or where there are relators*, his majesty's attorney general at the relation aforesaid further informeth your lordship] that thereupon application

Particulars of case certified by charity commissioners.

(*g*) See *ante*, pp. 428, 429. The above allegation applies only when the information is filed at the instance of the commissioners of charities.

Application for payment, &c.

was made to the said E. C. who was supposed to be in the possession of the whole of the said land, for payment of the arrears of the said rent charge, but that he paid no attention to such application, whereupon another letter was sent to him on the 18th May, 1826, stating that an information would be filed against him unless provision was made for payment, and that the said E. C. having referred to ——— his solicitor, various applications were made to him upon the subject, and after much difficulty it was discovered that the said E. E. was in possession of part of the land charged with the said rent charge, and application was made to him accordingly; in answer to which, he professed his readiness to pay such part of the said rent charge as might be fairly chargeable upon his proportion of the said lands, if the said E. C. would pay the remainder; and on the 31st day of August, 1826, such the proposal of the said E. E. was communicated by letter, by the solicitor of the attorney general to the said E. C. in order that an arrangement might be made between him and the said E. E. for payment of the said arrears and future payments; but the said E. C. took no notice of such communication, and on the 23rd day of May, 1827, a further application was made to him, and he was informed that unless the said rent charge was paid, an information would be filed against him and the costs thereof prayed against him; and on the 7th day of June, 1827, a further application was made to him, expressly for the purpose of enabling him to avoid the expense of a suit by the payments of what is due to the said charity, but notwithstanding such applications, he wholly refuses to make any payment on account of the said rent charge.

Attorney general submits that rent charge ought to be paid.

And the attorney general submits [*or*, and the said relators submit] that what is due to the said charity in respect of the said rent charge ought to be paid by the defendants E. C. and E. E. or one of them, or ought to be raised by sale or mortgage of the lands charged therewith, and that a proper provision and arrangement ought to be made under the directions of this honourable court, for securing the due payment of the said rent charge in future. And the attorney general [*or* at the relation aforesaid] shows that J. B. is the churchwarden of D. aforesaid, and J. W. the overseer of the poor of the same place, and entitled to receive the said rent charge as trustees for the distribution thereof. And the attorney general charges that the defendants respectively have in their possession or power, divers deeds, evidences, accounts, letters, papers, and writings, relating to the matters aforesaid, and by which the truth of such matters would appear; but they refuse to produce the same. To the end therefore that the said E. C., E. E., J. B. and J. W.

Interrogatories.

may, upon their several and respective corporal oaths, to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, perfect and distinct answer make to all and singular the matters and things aforesaid, as fully, particularly and distinctly as if the same were here again repeated, and they and each of them thereunto distinctly interrogated; and more especially that the said defendants may answer and set forth whether the said testator was not at the date of his will, and at the time of his death, seized in fee of the lands hereinbefore in that behalf mentioned; and whether the said testator did not make his will of such date, and in part to such purport and effect as is hereinbefore in that behalf mentioned, or of some other and what date, and to some such or some other and what purport and effect; and whether the said will was not executed and attested in such manner as by law is required for devising real estates; and whether the said testator did not die soon and when after the date of his said will; and whether the said sum of 10*l.* or some other and what sum, was not regularly paid by the proprietor of the said lands for the time being, on account of and for the benefit of the said charity from the death of the said testator, or from some other and what time, until the year 1812, or until some other and what time; and whether the said sum of *l.* or some other and what sum, was not deducted from the said annual rent charge of 10*l.* on account of the land tax, or how otherwise; and whether any and what payment has ever and when been made on account of the said rent charge since the said year 1812, or since some other and what time; and whether the lands charged by the said will with the payment of the said annuity or rent charge do not consist of a close of land within the precinct of B., in the said county of *Bucks*, containing five acres, or some other and what quantity, and of a cottage and other buildings, and several or some and what number of closes of land containing twelve acres, or some other and what quantity, lying within the precinct of O. in the said county, or how otherwise; and whether all or some and what part of the said lands were not or was not previously to the year 1812, or some other and what time, the property of the said C. C., or some other and what persons or person, and whom by name, and where they or he reside; and whether, in the said year 1812, or at some other and what time, the said C. C. did not sell the said close within the precinct of B., to the said D. D., or some other and what persons or person, and whom by name, and where they or he reside, and convey the same to the said D. D., or to some other and what person or persons, and whom by name; and whether the said C. C. did not, at the

time of the conveyance of the said lands to the said D. D., or at some other and what time, give to the said D. D. a bond to indemnify the said D. D. against the payment of the said rent charge; and whether the said D. D. did not enter into possession of the said close; and whether the said D. D. did not shortly afterwards, or at some other and what time, duly convey the same to the said defendant E. E., or how otherwise; and whether the said last-named defendant did not marry the daughter of the said D. D; and whether upon such conveyance being made to him, or at some and what time, the said defendant E. E. did not enter into possession of the said land, or some and what part thereof; and whether the said E. E. has not ever since been in possession thereof; and whether the said C. C. did not die soon and when after the said sale; and whether thereupon, by descent or devise, or otherwise, and how, from him the said defendant E. C. did not become seized of the said lands, or of some and what part or parts thereof within the said precinct of O.; and whether the said defendant E. C. did not enter into possession thereof, or of some and what part or parts thereof; and whether the said defendant E. C. has not ever since been in such possession, or how otherwise; and whether each of them the said E. C. and E. E. has not received from the said lands belonging to him since he has been in possession thereof, greatly and how much more than sufficient to satisfy the whole or some and what part of the said rent charge of 10*l. per annum*; and whether the particulars of this case were not some time since and when certified to his majesty's attorney general, by the commissioners for inquiring concerning charities in *England*, according to the provisions of the said act of parliament hereinbefore in that behalf mentioned, or according to the provisions of some other and what act of parliament; and whether thereupon application was not made to the said E. C. for the payment of the arrears of the said annuity; and whether, at the time of such last-mentioned application, the said E. C. was not supposed to be in possession of the whole or some and what part of the said lands; and whether the said defendant E. C. paid any and what attention to such last-mentioned application; and whether thereupon another letter was not sent to the said defendant E. C., on the 13th of May, 1826, or at some other and what time, to such purport and effect as is hereinbefore in that behalf mentioned, or to some such or some other and what purport and effect; and whether the said defendant E. C. did not refer such last-mentioned application to the said Mr. ——, and whether the said Mr. —— is not the solicitor of the said defendant E. C.; and whether various or some and what applications were not or was not made to the said Mr. —— upon the sub-

ject; and whether after much or some and what difficulty it was not discovered that the said E. E. was in possession of part of the land charged with the said annuity; and whether application was not made to the said E. E. accordingly; and whether in answer to such last-mentioned application the said E. E. did not profess his readiness to pay such part of the said annuity as might be fairly chargeable upon his proportion of the said lands, if the said E. C. would pay the remainder, or how otherwise; and whether, on the 31st day of August, 1826, or at some other and what time, such the proposal of the said E. E. was not communicated by letter by the solicitor of the attorney general to the said E. C., in order that arrangements might be made between him and the said E. E. for payment of the said arrears and future payments; and whether the said defendant E. C. took any and what notice of such last-mentioned communication; and whether on the 23rd day of May, 1827, or at some other and what time, a further application was not made to him; and whether the said defendant E. C. was not informed, that unless the said annuity was paid an information would be filed against him, and the costs thereof prayed against him, or how otherwise; and whether on the 7th day of June, 1827, or at some other and what time, a personal application was not made to him, expressly for the purpose of enabling him to avoid the expense of a suit by the payment of what is due to the said charity; and whether, notwithstanding such applications, the said defendant E. C. does not refuse to make any or what payment on account of the said annuity, or how otherwise; and whether what is due to the said charity in respect of the said annuity ought not to be paid by the defendants E. C. and E. E., or one and which of them, or ought not to be raised by sale or mortgage of the lands charged therewith; and whether a proper provision and arrangement ought not to be made, under the directions of this honourable court, for the due payment of the said annuity in future; and whether the said J. B. is not now the churchwarden of D. aforesaid; and whether the said T. W. is not now the overseer of the poor of the same place; and whether the said J. B. and T. W., or one and which of them, or who else by name, are not or is not entitled to receive the said annuity as trustees or a trustee for the distribution thereof; and whether the said defendants respectively, or some or one and which of them, have not or hath not in their or some or one and which of their possession or power, divers or some and what deeds or deed, evidences or evidence, accounts or account, letters or letter, papers or paper, and writings or writing, relating to the matters hereinbefore in that behalf mentioned, or some or one and which of them; and that they may set forth a list or schedule thereof, and

may leave the same in the hands of their clerk in court, for the usual purposes; and whether the said defendants respectively, or any or either and which of them, have or hath now in their or his possession or power, all such of the aforesaid particulars as at any time have or hath been in their or his possession or power; and if not, then that they or he may set forth what is become thereof, and in whose possession or power the same were when they or he last saw or heard of the same respectively. And that an account may be taken of what is due to the said charity, in respect of the arrears of the said rent charge; and that the same may be paid by the said defendants E. C. and E. E., or if as to any part thereof the same shall not be paid by them, that the same may be raised by sale or mortgage of the lands charged therewith (*h*); and that proper directions may be given for securing the due payment of the said rent charge in future; and that the costs of this suit may be paid by the said E. C.; or that your lordship will be pleased to make such further order and decree in the premises as may be most beneficial to the said charity: may it please your lordship to grant unto his majesty's said attorney general his majesty's most gracious writs of subpœna, to be directed to the said E. C., E. E., J. B., and T. W., thereby commanding them and every of them, at a certain day and under a certain pain therein to be limited, personally to be and appear before your lordship in this honourable court, and then and there to answer all and singular the matters aforesaid, and to stand to, perform and abide such order, direction, and decree therein, as to your lordship shall seem meet.

Prayer.

INFORMATION *against a Corporation and the Master and Usher of a Free Grammar School for Recovery of Property belonging to the School in the Possession of the Corporation, for an Account of Rents and Profits,—of the Purchase Money of Lands sold,—for a Scheme for the Application of Rents and Regulation of the School, with other Accounts and Inquiries.*

IN CHANCERY.

To, &c.

Informing, showeth unto your lordship, ————, knight,

(*h*) It is apprehended that since the stat. 3 and 4 Will. IV. c. 27, s. 42, *ante*, p. 455, n. (*w*), that only six years' arrears of a rent charge can be recovered in a case like the present, although rents for a more extended period may be recovered by the master of an hospital, or eleemosynary corporation sole. See 3 & 4 Will. IV. c. 27, ss. 1, 29.

his majesty's attorney general, that King Edward the Sixth, by letters-patent, bearing date on or about the 9th day of December, in the sixth year of his reign, on the petition as well of the bailiffs and burgesses of ————, in the county of ————, as of very many others of the whole neighbouring country, for the erecting and establishing of a grammar school there, granted and ordained that there should be a grammar school in the town of ————, which should be called The Free Grammar School of Edward the Sixth, for the education of boys and youths in grammar; and his majesty thereby gave and granted to the bailiffs and burgesses of the town of ————, for the sustentation of the school aforesaid, all that, &c. [*three chantries with the messuages, &c. thereto belonging, and the rents, &c. reserved on any demises; to hold the same to the aforesaid bailiffs and burgesses of the town of* ————, *and their successors for ever, &c. with power to appoint a master and under-master of the said school, and with the advice of the Archbishop of York, to make statutes in writing for the government of the school; and to receive and purchase other lands not exceeding a given amount, the rents to be applied for the maintenance of the said school,*] as in and by the said letters-patent, when produced to this honourable court, will more fully appear. Statements. Foundation of school by letters-patent.

And his majesty's attorney general further informing showeth, that by certain rules and regulations for the government of the school, made the 30th day of April, 1552, by the bailiffs and burgesses of ————, with the advice of the then archbishop of *York*, the course, study and discipline to be pursued in the school was settled; and it was provided, &c. [*the statutes were set forth.*] Statutes for the regulation of school.

And his majesty's attorney general further informing showeth, that, in pursuance and by virtue of the said letters-patent, the said bailiffs and burgesses entered into possession of the several estates thereby conveyed to them as trustees for the said charity; and the possessions of the said chantry of S. in L. consisted, &c. [*general statement of particulars of the lands of the several chantries.*] Possession of estates by corporation.

And his majesty's attorney general further informing showeth, that the bailiffs and burgesses were in the habit of granting leases of the said trust property in their corporate name, and did not in such leases describe themselves as trustees of the estates, though the rents thereof were sometimes made payable to the collectors of the school rents; but the said bailiffs and burgesses treated the said estates as if they were the owners thereof; and they have, as hereinafter mentioned, sold part of the said charity estates, but the remainder of such estates still remains vested in the said corporation as trustees for the said school. Mode of leasing estates.

And his majesty's attorney general further informing showeth, that the said school hath been maintained Maintenance of school by corporation.

by the said bailiffs and burgesses, and is still subsisting, but that the said school is not properly regulated, nor the revenues thereof duly administered, as hereinafter more particularly appears. And his majesty's attorney general further informing showeth, that the whole of the said charity estate in the parish of L. remains vested in and in the possession of the bailiffs and burgesses of ————, and the same now consists of a house, &c. but that about the year 1778, the said parish was inclosed in pursuance of an act of parliament, and much the greater part of the said estate consists of allotments awarded by the commissioners for the inclosure of the said parish in 1778, by whose award it is declared that the several allotments [*declaration in award*], and the said estate is now let at the annual rent of 105*l*. And his majesty's attorney general further informing showeth, that by an indenture, bearing date on or about the 30th day of April, in the twenty-fifth year of Queen Elizabeth [*conveyance of one of the charities by the bailiffs and burgesses to J. W. in fee*,] as in and by, &c. And his majesty's attorney general further informing showeth, that by an entry in a minute book of the corporation of ————, bearing date on or about the 4th day of September, 1652, after reciting, &c. [*the ruin of the parish church and the inability of the inhabitants to restore it, and the resolution of the corporation, that certain estates vested in them, either as trustees for the said grammar school or otherwise, should be sold in fee-farm, only reserving the ancient rent; and that the money to arise from such sale should be applied in rebuilding the church*,] as in and by, &c. And his majesty's attorney general further informing showeth, that the said charity estates, in the parish of K., were at that time under a lease to ————, granted by the said bailiffs and burgesses in the year 1647, for the term of twenty-one years, at the ancient rent of forty shillings *per annum*; and that some time in April, in the year 1656, the said bailiffs and burgesses contracted to sell to John Earl of C. the premises comprised in the said lease to the said [*lessee*], and also a messuage and certain lands in W., subject to the several reserved annual rents of forty shillings and seventeen shillings; and that by indenture, bearing date the 11th day of August, 1656, and made between the said bailiffs and burgesses of the first part, and the said Earl of C. of the second part, and J. W. of the third part, in consideration of the sum of 300*l*. paid by the said Earl of C., the said bailiffs and burgesses demised the said premises at K. and W. to the said J. W. as a trustee for the said Earl of C. for 1,000 years, at the several reserved annual rents of forty shillings for the premises in K. and seventeen shillings for those in W.; and by an indenture bearing date on the 12th day of August, 1656,

Particulars of part of estates.

Resolution of corporation to sell part of estates.

Conveyance of part of estates to a purchaser.

the bailiffs and burgesses conveyed the reversion of the same premises to certain trustees in fee, upon trust to preserve the rents of forty shillings and seventeen shillings to the bailiffs and burgesses, and subject thereto in trust for the said Earl of C. and his heirs, as in and by, &c. And his majesty's attorney general further informing showeth, that the said reserved rents of forty shillings and seventeen shillings still continue to be paid by ————, who is the present possessor of the said estate and premises at K., and that the same have been always considered by the corporation as received for the support of the school; and that the said estate at K. consists of 150 acres or thereabouts, and the same produces the yearly rent of 200*l.* And his majesty's attorney general further informing showeth, that by the return of the commissioners in the time of Edward the Sixth, and the accounts of the bailiffs, it appears that the possessions of the chantry of A. were let at rents amounting to the annual rent of 11*l.* 2*s.* but that the corporation of ———— are not now, as they allege, in possession of any property in [*names of places;*] and they have not, as they allege, in their possession any leases or writings relating to any property situate in either of those places. And his majesty's attorney general further informing showeth, that the said charity estate in the parish of N. at present consists of, &c. and that the whole estate is vested in the said bailiffs and burgesses, and is let at the annual rent of 22*l.* 10*s* And his majesty's attorney general further informing showeth, that the estates of the said charity in the said parish of B. also remain vested in the said bailiffs and burgesses, and that the same now consist of a farm-house, &c. [*general particulars*]. And his majesty's attorney general further informing showeth, that the Rev. W. H. by his will duly made and published as by law is required for passing real estates by devise, and bearing date on or about the 23rd day of June, 1673, [*devise of an estate upon trust to convey to the bailiffs and burgesses, for the benefit of the master and usher of the said school*]. And his majesty's attorney general further informing showeth, that the premises directed to be conveyed as aforesaid, were by indenture bearing date on or about the 4th day of December, 1673, conveyed to the bailiffs and burgesses of ————, upon the trusts of the said will, as in and by, &c. And his majesty's attorney general further informing showeth, that by indentures bearing date the 3rd and 4th days of May, 1693, [*statement of conveyance of part of last estate to discharge a fee-farm rent, and of other indentures conveying part of estate in exchange*]. And his majesty's attorney general further informing showeth, that the said six leys of meadow ground were purchased by the said corporation for the benefit of the said charity, in lieu of the said piece of ground so conveyed in

Payment of rents reserved.

Return as to value of one chantry.

Particulars of another estate.

Will giving other estates for benefit of the school.

Conveyance to the corporation in pursuance of the will.

Purchase of estate by corporation.

exchange for land at C. as aforesaid, such piece of land at C. being procured by the said corporation for their own benefit.

That no part of rents of one estate had been paid to the master.

And his majesty's attorney general further informing showeth, that no part of the rents and profits of the O. estate has been paid to the master and usher of the said school by the bailiffs and burgesses of ————, in addition to the salaries allowed to them, but only as part of such salaries.

Purchase of land by corporation.

And his majesty's attorney general further informing showeth, that in or about the year 1812, the bailiffs and burgesses of ————, purchased a ley of land, containing ——, lying intermixed with one of the closes devised by the said [*testator*] as aforesaid, for the sum of —*l.*, and that the same is now let with the rest of the estate, and that the estate belonging to the said charity at O. now consists of [*general statement of particulars*].

Redemption of land tax on all estates of corporation.

And his majesty's attorney general further informing showeth, that the land tax upon the whole of the said charity estates, and also upon various other estates belonging to the said corporation in fee, hath been redeemed, and that the same was redeemed in part by the sale of two pieces of land being part of the said charity estates in S. and L. aforesaid, one of which contained, &c. and was sold, &c.

Income of the charity estates.

And his majesty's attorney general further informing showeth, that the annual income received by the said bailiffs and burgesses from the said several charity estates, doth now exceed and hath since the year 1806 regularly exceeded the sum of 300*l.*, and that from the year 1762 to the year 1778, the same amounted on an average to 215*l.* and upwards.

Money expended by corporation.

And his majesty's attorney general further informing showeth, that considerable sums have been, as it is alleged, laid out by the said bailiffs and burgesses in the repairs and improvement of the said charity estates, and it is alleged by the said bailiffs and burgesses, that the ground upon which the school house is erected was originally purchased by the said bailiffs and burgesses, and that 300*l.* and upwards were laid out and expended thereon; and that a new house has been recently built for the master of the school, which, with a garden and stable adjoining, are worth 30*l. per annum* and upwards; and that a house for the usher has been also erected, which, with the garden belonging to it, is worth about 30*l. per annum*.

The amount of salaries paid to master and usher.

And his majesty's attorney general further informing showeth, that the salaries paid to the master and usher of the said school by the said bailiffs and burgesses since the year 1763, have been as follows: from 1763 to 1801, the master, 29*l. per annum*, and to the usher 21*l. per annum*; and from 1801 to 1808, to the master, 50*l.*; and from 1808 to 1813, to the master, the same salary, with the additional allowance of 2*l. per annum* for each boy instructed in Latin and Greek, and from 1813 the further allowance of the taxes on the school premises, such salary and allowances

amounting on an average to about 80*l. per annum*; and to the usher from the said year 1801, the sum of 30*l. per annum*. And his majesty's attorney general further informing showeth, that all the payments alleged by the said bailiffs and burgesses to have been made by them in the improvement of the said estates, and in the repairs of the premises, and in payment of the salaries of the master and usher or otherwise, have not been nearly equal in amount to the sums which they have received from the said charity estates, and that all the surplus of the said rents and profits hath and is converted by the said bailiffs and burgesses to their own use, and they lay claim to the said estates or some of them, as their own absolute property. And his majesty's attorney general further informing showeth, that it has been the custom of the bailiffs and burgesses to keep no separate rental of the school lands, but to apply the rents of all the estates in their possession indiscriminately to the general purposes of the said corporation, maintaining the school at the same time out of their revenues, by the allowance of such salaries as they from time to time have thought proper to give to the schoolmaster and usher, and by the repair of the school premises. And his majesty's attorney general further informing showeth, that the Rev. W. M. the present master of the school, was appointed by the corporation some time in the year 1801, and W. P. was appointed the usher some time in the year 1780, and continued to act as such till within a few months past, when he resigned, and J. H. who is the present usher, was appointed in his stead; and that the present establishment consists of two separate schools; and that the head master has no control whatever over the usher and his school; and that there are at present not above seven free scholars instructed by the master, and ten by the usher; and that the late usher, from his advanced age and his infirmities, before he resigned became totally unfit for his situation and the duties of his office, and that consequently the school was much neglected, and the number of the free scholars considerably diminished. And his majesty's attorney general further informing showeth, that the master has been in the habit of receiving gratuities from the parents of the different boys, and that the same amount to about two guineas a-year for each boy, and that the boys have been generally admitted on application to the master and usher. And his majesty's attorney general, &c. [*statement that particulars of case had been certified by commissioners of charities, ante*, p. 911]. And his majesty's attorney general submits and insists that all and every the lands of which the corporation are now seized in the several parishes mentioned in the said letters-patent granted by King Edward the Sixth, are

Payments on account of charity not equal to the income.

No separate accounts of charity estates kept by corporation.

Appointment of present master, and number of scholars.

Gratuities received by the master.

Attorney general submits that all estates in certain places belong to the charity.

their use, from such time as this honourable court shall think fit to decree, and of the application thereof by the said defendants or their predecessors; and that an account may be decreed against the said defendants accordingly, with such further directions as may be necessary for giving to the said charities the relief to which they are respectively entitled; and that the trusts affecting the said estates, lands, hereditaments, and premises may be respectively ascertained and declared by this honourable court; and that the said several charities may be ascertained and distinguished; and that the estates or proceeds of the estates, lands, hereditaments, and premises belonging to each may be ascertained and distinguished, and in future kept separate; and that distinct accounts may be kept thereof; and that the funds belonging to the said several charities may be applied to the charitable purposes respectively pointed out in the wills or deeds of the said respective testators, donors, or founders thereof, or to such other charitable purposes as may be nearest thereto, in case it shall be found impracticable to carry the same or some of them into effect specifically; and if necessary, that it may be referred to one of the masters of the court to approve of a scheme for the application of such rents and profits respectively, and also of such arrears or surplus rents and profits as this honourable court shall be pleased to order the said defendants to refund. And, &c. [*for further relief, ante, p.* 926].

STATEMENTS, *Charges, and Prayer in an Information at the relation of a Freeman of a Company on behalf of himself and the other Freemen of a Company, and of an Inhabitant of a City Ward, against a Company for Accounts of the Rents of Estates given by three Testators to the Company for different Charitable Purposes, and for the settlement of Schemes adapted to the intention in each Will.*

Particulars of property comprised in one gift.

[*Statements of deeds and wills giving estates to the company for various charities*]. And the said attorney general at the relation aforesaid further informeth, that the property comprised in and now subject to the trusts of the deed of feoffment first hereinbefore stated, consists of five small houses with gardens attached thereto, situate at W. aforesaid, and which are inhabited by five poor widows, parishioners of W. aforesaid, and that there are not now nor have there been for upwards of a century past, any trustees of the charity founded by the last-mentioned deed of feoffment, and that the heir of the said [*donor*] is unknown, but the whole management of such charity, and the ownership and disposition of the property

rishes aforesaid of [*naming them*] are the property of the said charity, and held by them as trustees only for the said charity; and that the said corporation never became seized of any lands in those parishes to their own use; and that they have no grants or conveyances of any such lands amongst their title deeds and muniments; and that it appears by various old leases and other documents in the possession of the said corporation, upon comparison thereof with the accounts of the possessions of the said chantries at the time of the dissolution thereof, that such leases relate to the same lands; and sometimes the said bailiffs and burgesses will admit that they are not able to produce any grants or conveyances to them of any lands in the several parishes aforesaid, except the said letters-patent; and to account for the absence thereof they pretend that by the fall of the church of ——, in the year 1651, a hutch, wherein the title deeds and other writings of the corporation were deposited and kept, was broken to pieces, and thereby the deeds and writings relating to the estates and premises aforesaid were destroyed, the contrary whereof his majesty's attorney general charges to be true, and that they have never had any such deeds or writings relating to the estates aforesaid, and that the same were not destroyed in manner aforesaid; and in proof thereof the attorney general charges that the corporation are now in possession of many old deeds and conveyances to them relating to property in places not mentioned in the said letters-patent, which are of much older date than the year 1651; and that no title deeds or conveyances of property in places where the charity lands were situate, are mentioned in schedules of deeds belonging to the corporation, of which there are some of very ancient handwriting; and sometimes the said bailiffs and burgesses pretend that their payment on account of the said estates, including the O. estate, and on account of the said school have exceeded or equalled their receipts on account of the said several estates, whereas the attorney general charges the contrary of all such pretences to be true, and that the receipts of the said bailiffs and burgesses on account of the said charity estates have greatly exceeded all the payments on account thereof; and that it would so appear, if the said bailiffs and burgesses would set forth a full, true, and particular account of the rents and profits of the said estates received by them in each year since the year 1763, and a like account of the payments made by them on account of the said estates, and of the said school during the same period. And the attorney general charges that the said bailiffs and burgesses have in their possession or power, divers deeds, leases, counterparts of leases, maps, plans, books, accounts, memoranda, papers, and writings, relating to or containing some entries or passages relating to the several

matters aforesaid or some of them, and whereby, if produced, the truth of such matters would appear (*k*). And the attorney general charges that the sales of the charity estates hereinbefore mentioned, were made for the benefit of the said corporation of——— and that such sales were a breach of trust on the part of the said corporation, and that the value of such estates ought to be restored to the said charity out of the possessions of the said corporation (*l*). And the attorney general charges that the said corporation is seized for its own use of estates sufficient to make such compensation, and that it would so appear if the said bailiffs and burgesses would set forth an account of their possessions and of the annual or other value thereof, but they refuse so to do. And the said [*master and usher*] claim to be entitled to some arrears by way of increase of their respective salaries, out of the same, to be found due from the said corporation. And the attorney general charges that by reason of the improper management of the said school, particularly in the division thereof into separate and distinct schools, the number of the scholars attending the said school hath been greatly diminished; and that a few years ago the number of scholars educated by the said charitable foundation amounted to about thirty-five, whereas at present the whole number of free scholars does not exceed seventeen; and that the number of scholars under the care of the usher used to be thirty, and that the present number does not exceed ten. And the attorney general charges that by the present regulations of the said school no scholars are admitted whose parents do not reside in the borough or parish of——, whereas the attorney general charges that the object of the said foundation was to establish a school for the benefit not merely of the said parish and borough, but also of the neighbouring country, and that the children of parents resident in the neighbourhood ought to be admitted to the said school as free scholars, but the said master and usher refuse to admit them. All which, &c. To the end therefore that

(*k*) In some informations the town clerk is made a party for the purpose of producing deeds, &c. See *ante*, pp. 443, 473. The following allegation should, in some cases, be inserted where the information is filed against a company: "That A. B. is now the clerk or secretary of the said company and is in the habit of receiving on behalf of the said company the rents and profits of the said company's estates, and of the said charity estates, and of settling the accounts respecting the same, and he is intrusted with or keeps in his possession all the deeds, books and papers of the said company, and he is well acquainted with all the particulars of the foundation and endowment of the said charity and of the estates belonging to the same, and the rents and profits thereof, and of all deeds, evidences and writings relating thereto, and in particular the deed [*of foundation*]."

(*l*) See *ante*, p. 465.

the said bailiffs and burgesses of ——, aforesaid, under their common seal, and the said [*master and usher*], &c. [*Interrogatories*].

And that the bailiffs and burgesses of —— may be declared by the decree of this honourable court, to hold as trustees for the said free school, all the estates of which they are seized in the several parishes mentioned in the letters-patent of King Edward the Sixth hereinbefore stated, and also the said estate at O.; and that the rents and profits of such estates may be appropriated and applied to the support of the free school according to the said regulations of the 30th day of April, 1552 (*m*), or in such other manner as the circumstances of the charity may render expedient; and that an account may be taken of all sums of money received by the said bailiffs and burgesses in respect of the said charity estates, by the rents and profits thereof or otherwise, and not appropriated to the purposes of the said charity from such time as shall appear proper to this honourable court (*n*); and that the same may be paid into court for the general purposes of the said charity; and that it may be referred to one of the masters of this honourable court to approve of a scheme for the application thereof, and of the future rents and profits of the said premises; and that an account may be taken of the sums of money produced by the sale of the said two small pieces of ancient inclosed land in S. and L. in the years 1805 and 1816; and that an inquiry may be directed as to what part thereof was applied otherwise than for the redemption of the land tax on the said charity estates; and that a compensation may be made by the said bailiffs and burgesses for so much thereof as was not applied in redemption of the land tax upon the said charity estates; and that a compensation may be made for the estates belonging to the said charity at T. and K. which were sold by the said bailiffs and burgesses as hereinbefore mentioned; and that the present value of such estate may be ascertained and made good to the said charity by the said bailiffs and burgesses, out of their own possessions (*o*); and that all proper directions may be given for that purpose; and that it may be referred to the said master to approve of a scheme for the management and conduct of the said school, with reference to the increased value of the income applicable to the maintenance thereof; and that the benefit of admission to the said school as free scholars may be extended to the children of parents resident in the neighbourhood of ——, as as well as to those resident within the borough and parish; and that [*the master*] may be restrained from accepting, Prayer.

(*m*) See *ante*, p. 917.
(*n*) See *ante*, pp. 455—465.
(*o*) See *ante*, p. 465.

any gratuities in respect of the boys educated at the school; and that your lordship may be pleased to make such further and other decree in the premises as the interest of the charity may require and to your lordship shall seem meet. May it please, &c.

CHARGES *and Prayer of an Information filed against a Corporation for correcting the Misapplication of various Charities founded by Ten Benefactors, and for putting the Charities on a proper footing.*

[*Statements of several old wills, giving various legacies for different charitable purposes, and the conveyance of an estate for the benefit of poor children working in a Jersey school, and other facts.*] And his majesty's attorney general submits, that the said mayor and aldermen of ——— have misapplied the several donations hereinbefore mentioned, and each of them, in applying the rents and profits arising from the said several charitable donations severally and respectively to the general purposes of the said corporation, and that they ought to account for all the rents and profits received by them from the said several charities and each of them respectively, and apply the same to the purposes of the said several and respective charities as may be most beneficial for the different objects thereof; and applications have been made to them accordingly to account for all the rents and profits received by them to the purposes of the said several and respective charities according to the intentions of the several founders and donors thereof. But now, &c. (*combination clause, ante*, p. 902) refuse to account for the said rents and profits so received by them as aforesaid, or any part thereof, under various pretences, that they have never applied any of the rents and profits belonging to the said charities, or any of them, to the use of the said corporation, but always to the use of the said several charities, and each of them, according to the proportion which each charity was entitled to receive in respect of the will or intention of its founder; and in particular, the said defendants pretend, that with respect to the said lands and tenements at E. and W., for which the sum of 1,050*l.* was paid as aforesaid, the same were not purchased with money belonging to the said charities, or any of them, but with the funds of the said corporation; and that the said L. estate was charged, as in the nature of a mortgage, with the sum of 960*l.*, being the amount of the said charitable donations hereinbefore in that behalf mentioned, and is now only liable

Attorney general submits that corporation ought to account.

Charge that estate was purchased with charity funds.

to pay the said sum, or the interest thereon, to the said charities; and that the said corporation for many years past have regarded the said transaction only as a mode of securing the said charitable donations, which were expressly ordered to be laid out at interest, and have in fact paid, and still pay to the said charities, an annual sum equivalent to legal interest upon the said sum of 960*l.*; whereas the attorney general charges the contrary of such pretences to be the truth; and that the said L. estate was a *bonâ fide* purchase made with the said charitable funds, and on behalf of the said charities comprised therein; and that, even if the said corporation exceeded their power as trustees by investing in land monies given to them to be laid out at interest, they cannot now take advantage of such breach of trust, and retain the estate under the pretence that the said purchase was only a mortgage. And his majesty's attorney general further charges, that in the year 1740 the said corporation considered themselves trustees of the whole of the said L. estate for the benefit of the said charities, and that the whole of the said lands were fixed to the use of the said charities; and as evidence thereof, his majesty's attorney general refers to the deed of 1740 hereinbefore set forth. And his majesty's attorney general further charges, that in or previous to the year 1757, a bill was filed in this honourable court against the said corporation by the creditors of R. T. who had been town clerk of the said corporation, for the purpose of recovering certain monies due from the said corporation to the said R. T.; and in or about the year 1757 the said corporation filed their answer to the said bill, in which answer they resist the claims of the said creditors by expressly setting forth, that the whole beneficial interest in the said L. estates belonged to the several charities mentioned in the said deed of 1740, and not to the corporation; and so the said defendants will at times admit; but then they pretend that they are at least entitled to a proportion of the said L. estate equivalent to the sum of 90*l.*, part of the said sum of 1,050*l.* advanced, as the said defendants pretend, by the said corporation out of their own funds at the time the said estate was purchased as aforesaid; whereas his majesty's attorney general charges the contrary to be the truth, and that the whole of the estate belongs to the said charities, out of whose funds it was purchased. And his majesty's attorney general charges, that the said sum of 90*l.* was, in fact, the accumulated interest received by the said corporation upon the several charitable donations which had remained unemployed in the hands of the said corporation for several years prior to the purchase of the said L. estate, and that the whole was the proper money belonging to the said charities; and that, if

Charges as evidence of purchase.

that part of purchase money was accumulated interest of charity fund.

any part of the said sum of 90*l.*, or any other sum, had been advanced or contributed by the said corporation to the purchase of the said estate, the said corporation would have reserved an interest in the said estate at the time of real purchase, and would not, as they have done by the said deed of 1740, have expressly renounced all interest in the said estate by declaring that all the said lands should for ever be to the use of the said charities; and therefore his majesty's attorney general submits and insists that the said defendants cannot now claim any beneficial interest in the said estate, but that the whole of the said estate, and all rents and profits heretofore received by the defendants belong to the said charities; and with respect to the said sum of 90*l.* or the portion of the said L. estate purchased therewith, his majesty's attorney general further charges, that if the said sum was advanced by the said corporation in the year 1715, at the time the said estate was purchased, the said corporation had ample time and opportunity to repay themselves by retaining the same out of the rents of the said estates during the interval between the years 1715 and 1740, when they held the estates, and appropriated none, or if any, a very small part only of the said rents to the use of the said charities, or any of them; and his majesty's attorney general submits, that if the said corporation had not by that or some other means reimbursed themselves, the same would have been stated in the said deed of 1740; and with respect to the said estates at G. and B., purchased as aforesaid with the said charitable donations of the said [*two donors*]; and also with respect to the said estate of G. the said defendants pretend that they have not expended the whole of the rent of the said estates in the maintenance of a Jersey school according to the directions of the founders, because the spinning of Jersey has for many years past been an unprofitable employment of the poor; and the said corporation pretend that they have distributed the whole of the rents of the said last-mentioned estates, to which the poor were entitled, in the relief and maintenance of the poor of N. or elsewhere; whereas his majesty's attorney general expressly charges the contrary thereof to be the truth, and so it would appear if the said corporation would set forth a just and true account of all sums expended by them in each year among the poor in respect of the said last-mentioned estates or charitable donations; and with respect to the said Jersey school, his majesty's attorney general submits and insists, that the said corporation had no power to alter or divert the purposes or objects of the said charitable donations, but that they ought to have administered the funds come into their hands according to the directions and intentions of the respective donors. And his

That corporation has been repaid any sum advanced by them.

That corporation had no power to alter charity.

majesty's attorney general charges that the said defendants have retained the whole, or nearly the whole, of the rents and proceeds of the said G. and B. estates, and also of the said estate of G. and applied the same to the use of the corporation for many years past, without expending any part thereof according to the directions or intentions of the said founders; but then the said defendants pretend that they are entitled to a beneficial interest in a portion of the said estates purchased as aforesaid with the said legacy of 240*l.* left for that purpose by Bishop W. as hereinbefore in that behalf mentioned, inasmuch as the said defendants pretend that the said corporation advanced 10*l.* out of their proper funds, making with the said sum of 240*l.* the sum of 250*l.*, which was the amount of the purchase-money paid for the said estate, and that they are therefore entitled to one twenty-fifth part of the rent of the said estate; whereas his majesty's attorney general charges the contrary of such pretence to be the truth, and that the said sum of 10*l.* was not in fact advanced by the said corporation, but was part of the interest of the said legacy of 240*l.* which had accumulated in the hands of the said corporation before the purchase of the said estate; or that if the said corporation advanced the said sum of 10*l.*, it was only by way of loan, and that they have long since reimbursed themselves out of the rents and profits of the said estates come into their hands; and the said defendants at times pretend that the rents and profits of the said estates hereinbefore mentioned have been small and inconsiderable, and that they have been duly applied upon the trusts of the said several charities respectively; whereas his majesty's attorney general charges the contrary of such pretences to be the truth, and that the said rents and profits have been very considerable, and that there has been every year, for many years past, a very large surplus, after making every payment which the said defendants have ever made in respect of any of the said charities; and so it would appear, if the said defendants would set forth a full, true, and particular account of the rents and profits of all the said estates, hereditaments, and premises received by them, or by their order, or for their use, and of their application thereof, for the space of six years before the inquiry by the said commissioners of charities, which the attorney general submits they ought to do; and his majesty's attorney general charges that the said defendants have yearly and every year converted such last-mentioned surplus to their own use, or to the use of the said corporation, and that by so doing they have been guilty of a breach of trust; for his majesty's attorney general charges, that the said defendants, the mayor and aldermen of N. aforesaid are trustees of the said several estates for the said several charities, with the funds whereof

That corporation have applied rents to their own use.

That there was a large surplus annually in hands of corporation.

That corporation have applied surplus to their own use.

they were severally and respectively purchased; and that the said several estates, and the rents and profits arising therefrom respectively, ought to be distinguished and kept separate, and apportioned among the different objects of the several charities respectively, according to the intentions of the several donors and founders, and in proportion to the amount of the funds destined to such objects respectively, which were invested in the said several purchases respectively.

That there are several other charities.

And his majesty's attorney general further charges, that there are several other charities for the relief of the poor at N. aforesaid, the funds of which are administered by the said corporation; and that when the said defendants pretend that they expend large sums annually out of the rents and profits of the said hereinbefore mentioned estates, in relief of the poor, and in pursuance of the objects and directions pointed out by the several donors and founders hereinbefore mentioned, such sums are in fact the proceeds of other charitable donations and foundations, and arise from estates or funds altogether separate and distinct from the said estates or funds hereinbefore mentioned, or any of them; and his majesty's attorney general further charges, that the said defendants have now or lately had in their possession or power divers deeds, parchments, wills, copies of wills, copies of court roll, corporation books, extracts or copies of extracts from or entries in books or a book, books of account, receipts, vouchers, documents, rentals, maps, plans, and other papers and writings relating to the matters aforesaid, whereby if produced the truth of the matters aforesaid would more fully and at large appear, but the said defendants refuse to produce the same; and the attorney general was in hopes that the several abuses hereinbefore mentioned would have been corrected without the interference of this honourable court, but the said defendants the mayor and aldermen of N. aforesaid, refuse so to do (*l*); To THE END, therefore, that the said defendants the mayor and aldermen of N. aforesaid, may, under their common seal, full, true, direct, and perfect answer make to all and singular the matters and things aforesaid, and that, &c. [*the usual interrogatories as to the statements and charges, including the following*]; whether the said mayor and aldermen have not always received and carried to the general account of the said corporation of N., the whole or some and what part of such rent; and whether they do not

That deeds, &c. are in possession of corporation.

Interrogatories as to application of part of the property.

(*l*) The town clerk of a corporation is sometimes made a party to a suit for the purpose of discovering and of giving information as to documents and entries in books. See *ante*, pp. 443, 473. By stat. 5 & 6 Will. IV. c. 76, s. 67, it is provided, that all the charters, deeds, muniments, and records of every borough, or relating to the property thereof, shall be kept in such place as the council from time to time shall direct, and the town clerk for the time being shall have the charge and custody of and be responsible for the same.

still receive the same, and carry the whole or some and what part thereof to such account, or how otherwise; and whether the said corporation have, and when in particular, since they have been in possession of the said charity estates applied more than a very small portion of the rent thereof to the purpose of the said charities, or any and which of them, or what have they ever and when expended in respect thereof respectively; and whether the annual disbursements made by the said corporation in respect of the said charities have not been of late years to the effect hereinbefore in that behalf respectively mentioned or how otherwise; and what have been the exact annual disbursements in respect of the said charities respectively; and whether the total of such disbursements does not amount to the annual sum of —*l.* or to some other and what sum; and whether all or some and what residue of the rent of the said L. estate has not been and is not still retained by the said mayor and aldermen, or by some and what person, by their order or for their use, and applied by them to the use of the said corporation of N., or to some and what other purpose, and what does such annual surplus amount to; and whether any part thereof is applied by the said defendants to any and which of the charitable purposes intended by the said hereinbefore mentioned donors, or any of them, and if yea that the said defendants may set forth the particulars of such application respectively; and whether the accumulated surplus of the said rents does not amount to a very large or some and what sum; and whether the said corporation have not received the same or some and what part thereof; and whether they have not received and ought not to account for and apply to the objects of the said different charities such sum, according to the intentions of the respective donors, and if not, why not.

That the said defendants the mayor and aldermen of N. may answer the matters aforesaid, and that the said defendants may be declared to be trustees of the several estates devised or given as aforesaid for charitable purposes, and also of the lands, hereditaments, and premises hereinbefore respectively mentioned, for the several charities whose funds were invested in the purchase thereof respectively; and that an account may be decreed to be taken by and under the direction of this honourable court of the rents and profits of the said estates, lands, hereditaments, and premises which have been devised or given for the benefit of the several charities hereinbefore mentioned, and also an account of the rents and profits of the said estates, lands, hereditaments, and premises purchased respectively in the years 1699 and 1715, or at any other time, with the said charitable funds received by the said defendants, or by their order, or for PRAYER.

their use, from such time as this honourable court shall think fit to decree, and of the application thereof by the said defendants or their predecessors; and that an account may be decreed against the said defendants accordingly, with such further directions as may be necessary for giving to the said charities the relief to which they are respectively entitled; and that the trusts affecting the said estates, lands, hereditaments, and premises may be respectively ascertained and declared by this honourable court; and that the said several charities may be ascertained and distinguished; and that the estates or proceeds of the estates, lands, hereditaments, and premises belonging to each may be ascertained and distinguished, and in future kept separate; and that distinct accounts may be kept thereof; and that the funds belonging to the said several charities may be applied to the charitable purposes respectively pointed out in the wills or deeds of the said respective testators, donors, or founders thereof, or to such other charitable purposes as may be nearest thereto, in case it shall be found impracticable to carry the same or some of them into effect specifically; and if necessary, that it may be referred to one of the masters of the court to approve of a scheme for the application of such rents and profits respectively, and also of such arrears or surplus rents and profits as this honourable court shall be pleased to order the said defendants to refund. And, &c. [*for further relief, ante, p.* 926].

STATEMENTS, *Charges, and Prayer in an Information at the relation of a Freeman of a Company on behalf of himself and the other Freemen of a Company, and of an Inhabitant of a City Ward, against a Company for Accounts of the Rents of Estates given by three Testators to the Company for different Charitable Purposes, and for the settlement of Schemes adapted to the intention in each Will.*

Particulars of property comprised in one gift.

[*Statements of deeds and wills giving estates to the company for various charities*]. And the said attorney general at the relation aforesaid further informeth, that the property comprised in and now subject to the trusts of the deed of feoffment first hereinbefore stated, consists of five small houses with gardens attached thereto, situate at W. *aforesaid*, and which are inhabited by five poor widows, parishioners of W. aforesaid, and that there are not now nor have there been for upwards of a century past, any trustees of the charity founded by the last-mentioned deed of feoffment, and that the heir of the said [*donor*] is unknown, but the whole management of such charity, and the ownership and disposition of the property

conveyed by the last-mentioned deed of feoffment, have, for a very long period of time been and now are vested in the said company of *Goldsmiths;* and the said attorney general at the relation aforesaid further informeth, that under and by virtue of the aforesaid will of the said [*testator*], the said company of *Goldsmiths* took and now hold and are possessed of two dwelling houses, situate in L. street, in the city of *London*, which are now in the tenancy or occupation of certain persons carrying on the trade or business of bankers, under the firm of ———, and to whom the same were some time since demised by the said company, at the rent of *l. per annum;* and the said company is also possessed of divers messuages and dwelling houses, situate in the parish of St. B., and one of which is the tenement mentioned in the said will of the said [*testator*], as situate in the last-mentioned parish, and thereby devised to the said company; and the rest of the same messuages and dwelling houses are derived and held by the said company under the said will of the said R. M., but the said company allege that they are unable to ascertain which of the same messuages and dwelling houses is that to which they are entitled under the said will of the said [*testator*]; and the attorney general at the relation aforesaid further informeth, that the said company have for many years past received annually sums of money exceeding 300*l. per annum*, for or in respect of the said messuages and hereditaments, so held by them as aforesaid, under the said will of the said [*testator*] in trust for the charitable purposes therein and hereinbefore stated, exclusive of premiums which they have received as considerations for leases which have been at various times made by them, of the same messuages and hereditaments or parts thereof; and the said company has, at different times, made some small additions to some of the charitable donations which are therein specified, but the whole amount of the disbursements annually made by the said company in or about the aforesaid charitable purposes of the same will, and the taxes and rates payable in respect of the said almshouses, have never exceeded, and do not now exceed, the sum of 85*l.* 11*s.* 4*d. per annum*, independently of the repairs of the said almshouses, which are of trifling amount; and the said company has, during many years, annually taken and applied, and does now take and apply, the whole surplus of the yearly income of the last-mentioned messuages and hereditaments, unto and for their own general corporate purposes; and the said attorney general at the relation aforesaid further informeth, that the said company of *Goldsmiths* did, under and by virtue of the aforesaid will of the said [*another testator*] take and are now possessed of seven messuages, &c., in &c., which

Company in possession of other property.

Receipts and disbursements by company in respect of certain property.

Company possessed of other property under another will.

have been, from time to time, during the last fifty years and upwards, demised by the said company at considerable annual rents; and upon the occasion of some of such leases being granted, the said company took and received large sums of money as and by way of premiums for the same; and such seven messuages or tenements are now let upon leases at rents amounting to the sum of 600*l.* and upwards in the whole which sum is annually received by the said company, and is justly applicable to such charitable purposes as were expressed or intended in and by the said will of the said [*testator*].

Augmentation of charities, and neglect of others.

and the said attorney general at the relation aforesaid further informeth, that the said company of *Goldsmiths* have augmented some few of the charitable gifts made by the said will of the said [*testator*] out of the increased rents of the said premises, subject to the trusts thereof, but the whole of the sums which are now annually expended by the said company in or upon the charitable purposes specified in the last-mentioned will, do not exceed the annual sum of 32*l.*; and the said company have, for a considerable time, wholly neglected and ceased to fulfil some of the said charitable bequests made by the said last-mentioned will, and in particular they have not for a long time paid the annual sum of *l.* or any other sum, in respect of the aforesaid bequest made by the said [*testator*] of the sum of *per annum*, unto the parson and churchwardens of W., to be distributed in bread among the poor, but the said company have, for a long time, retained and applied to their own use the sum that ought to have been annually applied as last aforesaid; and the said company have also yearly, and every year, for a long period, retained and applied to their own use (subject to such small payment thereout to their poor as hereinafter mentioned) all the residue of the rents and profits of the premises subject to the trusts of the said will of the said [*testator*], remaining annually after payment as aforesaid of the several yearly sums, amounting in the whole to the sum of 32*l.* *per annum*, or thereabouts, as is hereinbefore stated; and

That company is possessed of other property under another will.

the said attorney general at the relation aforesaid further informeth, that under and by virtue of the said will and codicil of [*another testator*] the said company is and has for a long time, been possessed of thirty-six messuages or dwelling-houses, and other premises, situate, &c., and which now are, or lately were, in the tenancy or occupation of such persons, and at such rents, or of such yearly value, as are mentioned and set forth in the schedule to the information annexed, and which the attorney general, on behalf of the said relators, prays may be considered and taken as part thereof; and the said attorney general at the relation aforesaid further informeth, that the rents reserved to and received

Amount of rents received.

by the said company from the said messuages in —— street aforesaid, amount to the sum of *l.* or thereabouts, but the yearly value of the same premises is greater than the rents reserved in the said lettings thereof, and the said company did in fact reserve large sums of money as premiums for the leases or some of the leases under which the premises described in the said schedule or some parts thereof are now holden; and the said attorney general at the relation aforesaid further informeth, that the premiums taken on demising the messuages and premises comprised in the said schedule, and the whole or by far the greater part of the annual rents and profits thereof, have for a long time been and now are taken and applied by the said company for their own use and benefit, and that no part thereof is now appropriated by them for the benefit of the poor inhabitant householders of the said ward of L., nor any part applied in relief of the poor of the said company; and the attorney general at the relation aforesaid further informeth, that inasmuch as great benefit would be derived from an increase of the charitable benefactions specified in the said wills of the said [*three testators*], and from an application of the yearly value of the said scheduled premises towards the relief of the poor inhabitant householders of the said ward of L. paying king's taxes, divers applications and requests have been made to the said company to apply the annual income derived by them under the wills of the said [*two testators*] as a proportionate augmentation of the several charitable gifts made by the same wills and in enlarging the charities thereby founded, and also to concur in an application to this honourable court, to direct in what manner the income derived under the will of the said [*another testator*] shall be applied in the relief of the poor inhabitants of the said ward of L., and for such purposes the said company have been requested to account for the premiums and surplus rents received by them, and in particular to account for and pay over to the parson and churchwardens of W. for bread for the poor there, the amount of the yearly sums which ought to have been but have not been so paid and applied by the said company; and the said attorney general, on behalf of the said relators, well hoped that the said applications and requests would have been complied with, as in justice and equity they ought to have been; but now so it is, may it please your lordship, the warden and commonalty of the company or mystery of *Goldsmiths* in the city of *London*, combining, &c., [*see ante*, p. 895] have refused, and still refuse, to comply with the said applications and requests, or to make any other disposition of the rents and profits of the said estates derived by them under the said wills than that which is now made by them; and the said company sometimes pretends, that the

Application of premiums.

Application to company to correct abuses.

Charges.

CHARGES. whole surplus of the income derived by them under the said wills of the said [*two testators*] respectively, after payment and satisfaction of the charitable bequests therein specified, is applied by them in relief of the poor freemen of their company, whereas the said attorney general, at the relation aforesaid, charges the contrary, and that although such surplus income has for some time amounted and does now amount to the annual sum of 1500*l.* or thereabouts, yet that the sum of 40*l.* and no more is carried to the poor account, and appropriated out of such surplus income to the relief of the poor of the said company; and further the said attorney general, at the relation aforesaid, charges, that large sums have at different times been received by the said company as premiums on granting leases of parts of the hereditaments held by them under the said wills of the said [*two testators*], or one of them, and that the whole of such premiums has been taken and applied to the general corporate purposes of the said company, or otherwise, for the use thereof, and not for any charitable purpose, and that the said company ought to make a discovery of all premiums received by them at any time or times in respect of leases or demises of any of the messuages and hereditaments held by the said company, under or by virtue of the several wills hereinbefore mentioned, and to account for and pay the same and interest thereon, and that the amount thereof ought to be added to and applied in like manner as the rest of the charity estates; and sometimes the said defendants pretend that a considerable yearly sum is expended by them on the repair of the said almshouses, whereas the said attorney general, at the relation aforesaid, charges the contrary, and that the sum actually expended in such repairs, year by year, has been inconsiderable, but that notwithstanding the said company has appropriated and carried to their own use out of such rents and profits the sum of —*l. per annum*, under pretence of such repairs; and the said attorney general, on behalf of the said relators, submits, that the bequest made to the said company in and by the said will of the said [*testator*], of the surplus remaining of the sum of —*l.* therein mentioned, is and was intended to be a specific bequest of the annual sum of —*l.* only, and that all the rents and profits of the hereditaments held under the same will ought to be applied in a proportionate augmentation of the charities thereby created and given; but then the said defendants pretend, that more than the whole surplus of the annual income of the premises held by them under the aforesaid several gifts of the said [*two testators*], and also one moiety of the annual profits of the premises held by them under the said will of the said [*another testator*] is annually given by them in charity to the poor of the said company, whereas the

said attorney general, at the relation aforesaid, charges the contrary, and that the rents of the aforesaid premises have never been carried, as they ought to have been, to a distinct and separate account, but to one general fund, to which large sums, the income of other estates given to the said company for charitable purposes, are also annually carried, and that the moneys applied by the said company annually in relief of their poor were and are drawn from such common or general fund, and were and are much less than the amount thereof, and that the residue is applied for the general purposes of the said company, and not in charity; and at other times the said defendants insist that the bequest made by the said [*testator*] for the benefit of the inhabitants of L. ward has from the change of times become impossible, and cannot now be carried into effect, whereas the said attorney general, at the relation aforesaid, charges the contrary, and that the benefit intended by the said [*testator*] for the poor inhabitants of L. ward, was relief from taxes payable to the king for the service of the state, and that there have always been and now are a great many poor inhabitant householders of the said ward, who might have been and would now be greatly relieved by the application of the income of the said estates held under the said will of the said [*testator*], in their relief from the king's taxes, payable by them in respect of their dwellings in the said ward, or by some other charitable and useful application of such income for their benefit; for the said attorney general, at the relation aforesaid, charges, that the fifteenths mentioned in the said will of the said [*testator*] were in fact taxes granted from time to time by parliament unto the king for the service of the state, and which were levied according to assessments made for that purpose, and that the taxes now usually denominated assessed taxes and other taxes of a like nature, and to all which the said ward is subject, have been and are granted to the crown in lieu of such fifteenths, and that many taxes are now levied for the service of the crown from the inhabitants of the said ward, which have taken the place of or are substituted for the fifteenths formerly levied, and which are a great burthen on the inhabitants of the said ward, and such as the said donors intended that they should be relieved from; and the said attorney general, &c. [*usual charge as to possession of documents, ante*, p. 930] relating to or showing the matters aforesaid, or some of them, and in particular the property held under the aforesaid wills, and the disposition and annual value and income thereof, and the application of the same, and from which, if produced, as the same ought to be, the truth of the matters aforesaid or some of them would appear: To THE END, therefore, that the wardens and commonalty of the company or mystery of

CHANCERY.

PRAYER. *Goldsmiths* in *London*, and their confederates, &c. [*interrogatories adapted to the previous statements and charges*]. And that the said defendants may answer the premises; and that it may be referred to one of the masters of this honourable court, to take an account of all the rents and profits of all and singular the messuages, lands, and hereditaments, received by or come to the hands of the said *Goldsmiths' Company*, from or in respect of all the messuages, lands, and hereditaments, held or possessed by the said company under or by virtue of the said several wills of the said [*three testators*], distinguishing the hereditaments held under each of the same wills, and the receipts of the said company in respect thereof; and also to take an account of all sums of money received by the said company for or in respect of premiums or otherwise, in consideration of any leases or demises made by the said company of the same messuages, lands, and hereditaments respectively, or any parts thereof, in like manner, distinguishing the premiums received in respect of each of the estates held under the same wills respectively; and that the said master may also take an account of the several sums of money annually expended by the said company in or about the charitable purposes specified in the said three wills respectively, distinguishing in each year the sums of money so paid in respect of the charitable bequests of each of the same wills; and that the said master may ascertain the surplus from year to year of the annual income of each of the said devised estates, and may calculate interest thereon from such time as the court shall think proper; and that the said defendants may be decreed to answer and pay what shall be found to have been received by them for premiums and rents and profits of or in respect of the said several devised estates, and not applied in any of the charitable purposes directed by the said wills respectively of and concerning the estates thereby respectively devised; and that what shall be found payable and decreed to be paid by the said defendants may be invested under the direction of this honourable court, and added to the said several charity estates; and that it may be referred to the master to approve of proper schemes for the future application of the increased rents and profits of the estates held under the said wills of the said [*two testators*], and of the funds, if any, which shall be added thereto, regard being had to the bequests of the same wills, and the intentions of the said [*testators*] appearing therein; and also to approve of a scheme for the application of the rents and profits of the estates held under the said will of the said [*another testator*], and of the funds, if any, which shall be added thereto, regard being had to the intention, and the benefit thereby intended for the poor inhabitants of the ward of L., and that all proper

directions for the purposes aforesaid may be given, and that such further, &c. [*further relief*].

Schedule of the messuages and hereditaments held by the said company of *Goldsmiths*, under the will of ———, hereinbefore stated.

Messuages in B. street and P. street, in the city of *London*.

TENANTS.	HOUSES.	RENTS.

Forms of Answers to Informations.

Answer *to an Information filed by the Attorney General against a Company for the purpose of establishing the right of the Charity to the whole Rents of the Estate.*

In the Exchequer.

The joint and several answer of the wardens and commonalty of the mystery of *Mercers* of the city of *London*, and of [16 *individuals*,] defendants, to the information of ——, knight, his majesty's attorney general, informant.

These defendants, saving and reserving to themselves respectively all benefit and advantage of exception which can be had or taken to the said information and the errors therein contained for answer thereto, or so much thereof as they are advised it is material or necessary for them to make answer unto, they, these defendants, each answering for himself and not one for the other or others of them, jointly and severally answer and say, they believe and admit it to be true, that such indenture as is in the said information mentioned to bear date the 12th day of May, 1619, was duly made and executed by and between such parties, to such purport and effect as is in the said information in that behalf stated, so far as the same is therein set forth; and that such other indenture as in the said information is mentioned to bear even date with the last-mentioned indenture, together with such schedule thereto as in the said information is mentioned, was also made by and between such parties, and to such purport and effect as in the said information is in that behalf stated, so far as the same is therein set forth: but these defendants, for their greater certainty as to the particular dates and contents of the said indenture and schedules respectively, humbly crave leave to refer to the same when produced to this honourable court. And these defendants further answering say, they believe and admit it to be true, that new trustees have from time to time been chosen out of the *Mercers' Company*, to whom the estates in the said indenture respectively mentioned have from time to time been conveyed; and that these defendants hereinbefore particularly named are now the present trustees of the said

estates. And these defendants, the wardens and commonalty of *Mercers*, further answering say, they admit, and these other defendants believe the same to be true, that the said trust estate consists, &c. [*particulars of estate, and how it had been let, and as to the application of rents.*] And these defendants further answering say, they believe it to be true, that the sum of 17*l.* was the annual value of the said premises at the time in the said information in that behalf mentioned: but these defendants say, that the payments directed to be made under the said indenture not only amounted to the said sum of 17*l.*, but, as it appears to these defendants, exceeded such value by the sum of 2*l.* 8*s.* 8*d.* or thereabouts. And these defendants, the wardens and commonalty of *Mercers*, further say, and these other defendants believe the same to be true, that the said trust estate was in the year 1816 indebted to these defendants the wardens and commonalty in the sum of 124*l.* 6*s.* 5*d.* or thereabouts; and that in the year 1817 their expenditure on account of the said estate exceeded their receipt by the sum of 4*l.* 14*s.* 3*d.*, or thereabouts; but that since such last-mentioned period their receipts have exceeded their expenses by the several sums of money particularly stated and set forth in the schedule hereinafter referred to. And these defendants, the wardens and commonalty, further say, and these other defendants believe the same to be true, that the present expenditure among the particular objects pointed out in and by the indentures in the said information mentioned, amounts, under the circumstances hereinbefore mentioned, to the sum of 11*l.* 2*s.* 8*d.* only, as specified in the said schedule; and that the said surplus rents, so received as aforesaid, have since the year 1816 been, and now are carried by these defendants, the wardens and commonalty, to the general account of the said company, and after satisfying thereout, in the first instance, the said debt of 124*l.* 6*s.* 5*d.*, been applied with their other funds for their general purposes, and not to any charitable purposes in particular. And these defendants, the wardens and commonalty of *Mercers*, further answering say, they admit, and these other defendants believe the same to be true, that J. B., in the said information named, duly made and published his last will and testament in writing, bearing date the 20th day of May, 1630, whereby, amongst other things, he gave and bequeathed to the said company of *Mercers* the sum of 200*l.*, and thereby directed and empowered the said company to lend out the said sum to two young men of the said company for the term of five years successively at the rate and interest of 3*l. per cent. per annum*, the yearly benefit thereof to be put to the account of the rents of his said lands at H.; and that the said sum of 200*l.* was duly paid to and received by the said com-

pany, and that the same is not now lent out in the manner directed by the said will, by reason of no applications having been made for the loan thereof. And these defendants further answering say, they have been informed and believe, that the particulars of this case have been certified to his majesty's attorney general by the commissioners for inquiring concerning charities, under the act in the said information mentioned. And these defendants, the wardens and commonalty of *Mercers*, submit to the judgment of this honourable court, whether according to the true construction of the indentures in the said information and hereinbefore mentioned, and the true intent and meaning of the said J. B., the present increased rents of the premises in the said information mentioned ought to have been applied by the said company, in the manner in the said information alleged, and whether the said company ought to account for the excess of the rents of the said estate since the year 1816, beyond what has been applied by them as aforesaid (*m*); and, also, for the interest of the said sum of 200*l.*, bequeathed by the said J. B. to be lent out as aforesaid, and whether such interest should be applied to the same purpose with the rents of the said estate; or whether, on the contrary, subject to the particular payments directed to be made by the said trust deed, these last-named defendants are not entitled to dispose of, without control, the income of the said estate, and the interest of the said sum of 200*l.* [*or* And these defendants, the wardens and commonalty of the mystery of *Mercers*, for themselves say, they submit to the judgment of this honourable court, whether they ought to be considered as mere trustees of the whole of the income of the estate and premises in the said information mentioned, and ought to account for the surplus of the rents and profits of the same above the sum of 521*l.* 2*s.* *per annum*, and the dividends of the said sum of 800*l.* three per cent. consolidated bank annuities, and whether such surplus ought to be applied in the manner in the said information in that behalf alleged; or whether, on the contrary, according to the true construction of the indenture in the said information and hereinbefore mentioned, and the true intent and meaning of the said Sir T. B., these defendants are not well entitled, after payment of the particular sums of money directed to be paid by the indenture and schedule in the said information and hereinbefore secondly stated (except the sum of 20*l.* to Christ's hospital, which has been purchased by these defendants, as aforesaid) to apply the residue of the rents and profits of the said estate and premises to and for the general purposes of the said

Defendants submit that they are entitled to increased value of property.

(*m*) See *ante*, p. 557.

company, or otherwise, as they may deem proper. But these defendants further say, that in case this honourable court shall be of opinion that these last-named defendants are not so entitled, then these defendants submit to act in regard to the premises as this honourable court shall direct, claiming only for themselves, their poor brethren, and such of their officers as are named in the said deed of trust, such increased proportion of the said rents and profits, as under the circumstances hereinbefore mentioned they are respectively entitled to. And these defendants further answering say, that in the first schedule to this their answer annexed, and which they pray may be taken as part thereof, they have set forth, according to the best of their respective knowledge, information, and belief, the amount of the rent received for the last ten years from the said estate, and what has been the net annual amount upon an average of such period, and what during the same period has been the average annual sum received by these defendants, the wardens and commonalty, in respect thereof, and what has been the average annual amount of the sums applied by them during the same period to the charitable purposes in the said information mentioned.] And these defendants further answering say, that in case this honourable court shall be of opinion that these last-named defendants are not so entitled, then they submit to act in regard to the premises as this honourable court shall direct, claiming only for themselves, and such of their officers as are named in the said indenture or deed of trust, such increased proportion of the said rents and profits as, under the circumstances hereinbefore mentioned, they are respectively entitled to. And these defendants further answering say, that in the first schedule to this their answer annexed, and which they pray may be taken as part thereof, they have set forth, according to the best of their respective knowledge, information, and belief, a full, true, and particular account of all and singular the rents and profits of the said estate received by them since the year 1816, and how they have applied and disposed of the same; and also a like account of the interest received of them from the said sum of 200*l.* since the same time, and of the application thereof. And these defendants have also, in the second schedule to this their answer annexed, and which they pray may be taken as part thereof, set forth, according to the best of their respective knowledge, remembrance, information, and belief, a list of all and every the deeds, accounts, books of account, receipts, vouchers, papers, and writings, relating to the matters in the said information mentioned, or any of them, which now are, or at any time have or hath been in their or either of their possession or power. And these defendants, the wardens and commonalty of *Mercers*, say that they are perfectly

willing to produce such books, accounts, papers, and writings, respectively, at all reasonable times, as this honourable court may direct; but they humbly hope, that the same may not be ordered to be left in the hands of their clerk in court, inasmuch as they, or many of them, contain matters and entries relating to other matters, and are wanted for the general purposes of the said company; and all these defendants deny all and all manner of unlawful combination, &c.

The first schedule above referred to contained an account of receipts and disbursements from 1816 to 1823.

The second schedule above referred to contained schedule of deeds, &c.

ANSWER *of the Attorney General to a Bill which concerned a Charity.*

The answer of ——— knight, his majesty's attorney general, one of the defendants to the bill of revivor and supplement of ——— the complainants.

THIS defendant, now and at all times hereafter saving and reserving to himself on behalf of the several charities in the said bill of revivor and supplement mentioned, all benefit and advantage of exception or otherwise to the said bill of revivor and supplement for answer thereto, or to so much thereof as concerns this defendant in anywise to make answer unto, answering saith, he is a stranger to all and singular the several matters and things in the said bill mentioned and contained, and therefore leaves the said complainants to make such proof thereof as they shall be enabled. And this defendant on behalf of the said several charities claims all such right and interest in the premises in the said bill of revivor and supplement mentioned as this defendant on behalf of the said several charities shall appear to have therein; and this defendant submits the same to the judgment, order, and direction of this honourable court, and hereby prays that this honourable court will take care of the respective rights and interests of the said several charities in the premises; without this, that there is any other matter, cause or thing in the complainants' said bill of revivor and supplement contained, material or effectual in the law for this defendant to make answer unto and not herein and hereby well and sufficiently answered, avoided, traversed or denied, is true to the knowledge and belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain and prove as this honourable

court shall direct, and hereby prays to be hence dismissed with his reasonable costs and charges in the cause in this behalf most wrongfully sustained.

INTERROGATORIES *for the examination of Defendants under a Decree as to Estates* (n).

IN CHANCERY.

Between his Majesty's Attorney General at the relation of [*names of relators*] *informant*,

and

The wardens and commonalty of the mystery of *Goldsmiths* in the city of *London*, , *defendants.*

[WALTON'S CHARITY.]

INTERROGATORIES exhibited on behalf of the said relators before ————, Esquire, one of the masters of this honourable court to whom this cause stands referred for the examination of the said defendants pursuant to the decree made in this cause, bearing date the 1st day of July, 1833. In the first instance as to the inquiry thereby directed as to the lands, messuages or tenements, and hereditaments possessed and now held by the said defendants under the will of W. W. the testator in the pleadings and decree named.

1st Interrogatory.—Have not you or some of you or some and what persons or person in trust for you or some of you or your predecessors in the *Goldsmiths' Company* for the time being at some and what time possessed, held and enjoyed, and do not you or some of you or some and what persons or person in trust for you now possess, hold or enjoy under the said will of the said W. W. the testator in the pleadings and decree named, some and what lands, messuages or tenements and hereditaments other than and besides the said several messuages or tenements with the appurtenants mentioned and set forth in your answer put into the said information and therein admitted to be held by you under, upon and subject to the trusts of the said will of the said testator. If yea set forth a full, true, and particular account and description of all, each and every of the same lands, messuages or tenements and hereditaments, together

(n) See Equity Draftsman, 2nd Vol. 148—231; 2 Newl. Ch. Pr. 379.

with the qualities, natures, quantities, parcels, abuttals, sites and situations, tenants' names, yearly rental and value of the same respectively, and make answer to the several matters and things herein inquired after to the best and utmost of your respective knowledge, remembrance, information and belief.

2nd Interrogatory.—Is there not some and what ground or reason to believe or suppose that you or your predecessors, or the *Goldsmiths' Company* for the time being, were possessed of and held under the said will of the said testator some and what lands, messuages or tenements and hereditaments other than and besides the said messuages and tenements mentioned and set forth in your said answer in the preceding interrogatory mentioned, and whether or not that such other lands, messuages or tenements and hereditaments have been in some and what manner alienated or otherwise and how lost to the said charity or charitable trusts of the said will of the said testator, or how otherwise in particular. Make answer, &c. [*as before*].

3rd Interrogatory.—Whether such other lands, messuages or tenements and hereditaments in the preceding interrogatories mentioned and inquired after have not been and are not now, or whether there do or does not exist some and what grounds or reasons, ground or reason for believing, and whether you do not believe that the same or some and what lands, messuages or tenements and hereditaments once possessed and held by you or by some persons or person in trust for you derived under the said will of the said testator, have been and now are in some and what manner intermixed, confused in boundaries, and confounded with other and what lands, messuages or tenements and hereditaments of and belonging to or vested in the said defendants, or how otherwise. Make answer, &c.

4th Interrogatory.—Do you not now possess, hold, or enjoy some and what other lands, messuages or tenements and hereditaments adjoining and near unto the said messuages or tenements with the appurtenances in your said answer mentioned and admitted to be held by you under the said will of the said W.W. And whether such lands, messuages, tenements and hereditaments or some and which of them do not answer or in some and what manner correspond or tally with the description of lands, messuages or tenements and hereditaments mentioned and described in the will of the said testator. If yea, set forth a full, true, and particular account and description of all, each, and every such lands, messuages or tenements and hereditaments so mentioned, referred to and inquired after, together with the qualities, natures, quantities, parcels, abuttals, sites, situations,

tenants' names, yearly rental and value of the same respectively.

5th Interrogatory.—Is it not the fact that the said lands, messuages or tenements and hereditaments in the next preceding interrogatory inquired after as being possessed, held and enjoyed by you or some and which of you, are not now possessed, held and enjoyed by you as part of the property vested in you for general corporate purposes, and whether the same or some and what other lands, messuages or tenements and premises now vested in and possessed, held or enjoyed by you or some and which of you are not now so possessed, held and enjoyed without there being any title deeds, documents of title of or belonging thereto, or any evidence to show how the same respectively are derived or acquired by the said *Goldsmiths' Company*, or how and by what title do you possess, hold and enjoy the same, and from whom and how were the same respectively derived and acquired to or by you or the said *Goldsmiths' Company*. Make answer, &c.

6th Interrogatory.—Whether or no have you made or caused to be made and when and by whom any and what searches, investigations or examinations of and into any and what deeds, wills, documents, books, papers and writings for the purpose of ascertaining and identifying the particular lands, messuages or tenements and hereditaments derived or acquired by you or the *Goldsmiths' Company* from or under the said will of the said W. W. If yea, set forth the particulars and results of such searches, investigations and examinations respectively, and whether or no were any and what reports, surveys, memorandums, notes or entries ever and when and by whom and upon what occasions made touching or concerning the same, or otherwise, relating to the lands, messuages or tenements and premises so derived or acquired as aforesaid. Make answer, &c.

7th Interrogatory.—Is it necessary for the purpose of properly and satisfactorily prosecuting and making the said inquiry directed by the said decree, that you should set forth and set forth accordingly a full, true, and particular account of all and every the lands, messuages or tenements and hereditaments now possessed, holden and enjoyed by you or any of you or any person or persons in trust for you in or near any of the streets, places, or sites mentioned in the said will of the said testator as the streets, places, or sites in which the said lands, messuages or tenements and premises in the said will mentioned and thereby devised to the *Goldsmiths' Company*, are described as situate and being, and also whether or no you have any and what title deeds, muniments of title, evidence or documents belonging to the

same, and showing how and from whom and by what gifts or devises, gift or devise other than the said will of the said testator the same were respectively derived or acquired by you or your predecessors the *Goldsmiths' Company* for the time being. Set forth and make answer, &c.

Lastly.—Have not you or some of you now and whether not lately and when last had in your possession or power, or in the custody of some solicitor or solicitors, agent or agents of yours, some and what deeds, wills, muniments, documents, books, rentals, papers and writings of, belonging or relating to the lands, messuages or tenements and hereditaments derived to or acquired by you or your predecessors the *Goldsmiths' Company* for the time being from and under the said will of the said W. W. or some and which of them, and whether not also of, belonging or relating to the messuages or tenements and hereditaments in the fourth and fifth and in the seventh of these interrogatories respectively mentioned, referred to and inquired after, or some and which of them, and whether not also some and what other deeds, wills, muniments, documents, books, rentals, reports, surveys, notes, memorandums, papers and writings of, relating to or in some manner concerning the several matters and things hereinbefore mentioned or referred to and inquired after or some of them, and whether not, which are material or necessary to be produced and inspected for the purpose of the said inquiry so directed by the said decree. Set forth in a schedule a full, true, and particular list and statement of all, each and every the said several items or particulars so respectively enumerated and inquired after, and distinguish and account for such of the same as having once been, are or is no longer in your possession or power or under your control. Make answer, &c. (*o*).

Forms of Petitions.

Petition *to the King as Visitor of a College.*

To the King's most excellent Majesty, in his high Court of Chancery, visitor of *Queen's College* in the University of *Cambridge* (*p*).

(*o*) By the 32nd order of the Court of Chancery, 21st December, 1833, it is directed that the last interrogatory then commonly in use should be altered, and be in the words or to the effect following: "Do you know or can you set forth any other matter or thing which may be of benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or to the matters in question in this cause? If yea, set forth the same," &c.

(*p*) See *ante*, pp. 333—343, 718, 719, and Bowdler's case of *Queen's College*.

The humble petition of B. A.

SHEWETH,

That the said college was founded by Lady Elizabeth, consort of Edward the Fourth, king of *England*, in or about the year 1448, and a body of statutes was given by the said foundress for the government thereof. [*The statutes and other facts were stated.*] Your petitioner therefore humbly prays your majesty, that the premises may be considered, and that your majesty as visitor of the said college would be graciously pleased to cause it to be declared that the said office of president is vacant, and that the said ——— ought to be amoved therefrom, and that a new election ought to take place to fill the same; or, in case it shall appear under the circumstances of the case that the right of nominating or appointing to the said office devolves to your majesty as visitor, then that your majesty would be graciously pleased forthwith to nominate and appoint to the same; or, that your majesty would be pleased to cause such other order to be made in the premises as to your majesty may appear just and proper; and that the book of statutes of the said college may be produced at the hearing of this petition.

And your petitioner shall ever pray, &c.

[*Signature of petitioner.*]

Prayer of Counter Petition.

Your petitioners most humbly pray, that your majesty will be pleased to declare that the said [*president*] was not duly elected to the said office of president; but on the contrary, that your petitioner W. M. was duly elected and ought to have been admitted thereto; and that the said C. D. as senior fellow of the said college may be directed to admit him thereto accordingly; or in case your majesty should be of opinion that, under the circumstances above stated, no valid election took place, your majesty will be pleased to give the necessary directions to the fellows of the said college to proceed to a new election, and will also be pleased to declare whether the said [*president*] shall or shall not be allowed to vote at the said election; or that your majesty will make such other order in the premises as the nature of the case may require and to your majesty seem meet; and that the said ——— and ——— one of the fellows of the said college, may be required to answer this petition; and that your petitioners may be heard by themselves or their counsel or otherwise, in support of the case; and that on the hearing of this appeal, the said [*president*] may produce the statutes of the said college, and the admission and

order book thereof, together with such other muniments of the said college as relate to the subject of this petition, and that in the mean time your petitioners or any of them, or their or any of their agents, may be allowed to inspect the same and to take copies thereof, or extracts therefrom.

And your petitioners will ever pray, &c.

[*Signature of petitioners.*]

PETITION *for the Appointment of Trustees of Charity Estates and for vesting the same in them, and for a Scheme for the regulation of the Charity.*

IN CHANCERY.

In the matter of A. B.'s charity (*q*).

To the Right Honourable the Lord High Chancellor of Great Britain.

The petition of [*two persons*]

SHEWETH,

That [*the will of the donor giving estates in fee for educating a boy of his blood and name of B. at school, until such boy should be fit to be removed to one of the two universities, but not to be kept at school after nineteen years; such boy, when fit for one of the universities, to be kept there for seven years. In case there was no boy of his name and blood who was fit for such education then another was to be chosen. The testator directed his trustees to account yearly to the rectors for the time being of four parishes, and that the person who had received the benefit of the testator's benefaction after having taken his degree of Master of Arts should act as a trustee, and that* 10*s. should be allowed for making up the accounts. The testator directed his executors to purchase an advowson, to receive a scholar of his name when his time of seven years in the university had expired and the livings should be vacant. An advowson was accordingly purchased. Other facts were stated, showing in whom the trust estates were vested, and some breaches of trust in the present trustee in refusing to apply the rents of the estates according to the testator's directions.*] That the said trust property over which the said [*trustee*] exercises an exclusive control, consists of [*the general particulars of the estate, including the perpetual*

(*q*) Where the petition is presented in a cause, the title of it should of course be added.

advowson of a rectory.] That the said [*trustee*] is very far advanced in years, being of the age of ninety-three years and upwards, and totally incapable of attending to the management of the said charity estates and the performance of the trusts to which the said estates are subject. Your petitioners submit that proper persons should be appointed trustees of the said charity in the room of the said [*trustee*] (of which trustees the said C. B. if he should think proper to accept such trusts should be one), and that proper directions should be given for having the accounts of the said charity regularly examined and passed, and for the due application of the income of the said charity to the purposes thereof. Your petitioners therefore humbly pray your lordship that it may be referred to one of the masters of this honourable court to approve of proper persons to be trustees of the said charity estates in the room of the said [*trustee*], and that all proper directions may be given for vesting the estates of the said charity in the trustees so to be appointed, and that it may be referred to the said master to approve of a scheme for the future regulation of the said charity with a view to have the accounts thereof regularly passed and the income properly applied to the charitable purposes to which the same is applicable. And that such further or other order may be made in the premises as may be proper for the establishment and regulation of the said charity.

PRAYER.

PETITION *to confirm the Master's Report, made in pursuance of the Order obtained on the preceding Petition, and for Taxation and Payment of Costs.*

IN CHANCERY.

In the matter of A. B.'s charity.

To, &c.

The petition of *two* [*persons*]

SHEWETH,

That by an order in this matter made by his honour the vice-chancellor on the —— day of ——— on the petition of your petitioners it was ordered that it should be referred to the master in rotation to appoint proper persons to be trustees, of the charity estates in the stead of [*the old trustee*] and it was ordered that the said [*trustee*] should convey the trust estates to such new trustees so to be appointed upon the trusts created by the will of [*donor*] relating thereto or such of them as were then subsisting and capable

of taking effect. And it was ordered that the said master should settle such conveyances; and it was ordered that the said master should approve of a scheme for the regulation of the charity and for the application of the rents and income arising from the estates belonging to the charity, and he was to state the same to the court, and thereupon such further order should be made as should be just. And it was ordered that the parties should produce before the said master upon oath, all deeds, books, papers and writings in their custody or power, relating to the said charity as he should direct. That ————, the master in rotation, to whom this matter was referred, made his report, dated the —— day of ———— whereby he certified, &c. [*The report stating the will of donor, certain facts as to the former management of the estate, the particulars of the property, the petitioners' proposal as to new trustees, and that the master had appointed new trustees, and had settled and approved the conveyance to them, and caused the same to be engrossed, and in testimony of his approval had signed his allowance in the usual way.*] And as to that part of the said order, whereby it was referred to the said master to approve of a scheme for the regulation of the said charity and for the application of the rents and income arising from the estates belonging to the said charity, and to state the same to the court, the said master certified he had settled and did approve of the following as a scheme for the regulation of the said charity, and for the application of the rents and income arising from the estates belonging to the said charity, *viz.* That the rectors for the time being of the said several parishes of [*four*], shall be the trustees of the charity in whom the charity estates shall be vested, and that upon the decease of one of such rectors, the survivors shall execute the necessary conveyance for vesting the charity estates in the survivors and the new rector. That the senior for the time being of such persons as shall have received benefit by the said testator's benefaction, and shall be qualified as in his said will mentioned, shall be entitled to attend all meetings of the said trustees and act and vote as a trustee in all matters relating to the said charity. That the trustees for the time being shall from time to time let and demise the said trust estates by public auction (of which a month's previous notice at the least shall be given by advertisement in one or more newspapers circulating in the neighbourhood) at the best annual rent or rents that can reasonably be obtained for the same, and for any term or number of years, not exceeding fourteen years in possession, and not in reversion, and without taking any fine on the granting of any such demises, provided that the lessees shall execute counterparts of the

SCHEME.

Who to be trustees.

How charity estates are to be let.

leases, to be granted to them respectively, and shall covenant with the said trustees for the payment of the rent and proper cultivation of the land; and shall also, if required by the said trustees, give sufficient security for the due payment of the rent and performance of the covenants reserved and contained by and in such leases respectively; and that no trustee of the said charity estate shall at any time, either directly or indirectly, accept a lease of, or hold, or occupy the said estates, or any part thereof, for his own benefit, or for the benefit of any other person or persons; that the trustees for the time being of the said charity estate shall elect one of themselves, or some other fit and proper person to be receiver of the rents and profits of the said charity estates; and that such receiver being one of the said trustees shall receive no compensation for his trouble as such receiver, and not being one of the said trustees shall give sufficient security for duly accounting for and paying the moneys which may come to his hands, and for the faithful performance of his duty, such receiver to continue in office so long as the trustees shall think proper, and to be subject to be removed by them, or the major part of them, at any time; and such receiver may be remunerated for his trouble by the said trustees, out of the rents of the said estates, provided that such remuneration do not exceed *5l. per cent. per annum* upon the rents received; that the receiver for the time being shall keep a regular account of his receipts and expenditure in respect of the said charity estates; and that such account shall be made up and audited by the said trustees, or the major part of them, at a meeting to be held within one month after the 29th day of September in every year; that a particular description of the said charity estates, with this scheme for the regulation and management thereof for the application of the rents and profits arising therefrom shall be entered in a book which shall be kept in the parish chest in the church of the said parish of A.; that all deeds, papers, leases, and documents belonging to the said charity and charity estates shall be kept in a chest to be deposited in the church of the said parish of A., to which there shall be three separate and different locks, the key of one of which locks shall be kept by each of the said rectors; that whenever a vacancy shall occur in the said rectory of B. by the death or resignation of the present or any succeeding rector thereof, the trustees for the time being, or the majority of them, shall be enabled to nominate to the said rectory any person duly qualified according to the directions of the will of the testator; that whenever a vacancy shall occur for a boy to be educated under this charity, the trustees for the time being shall cause due notice to be given of the vacancy, and at a meeting of the said trustees, to be

Receiver to be appointed.

Accounts to be kept and audited.

Documents where to be deposited.

Vacancies in rectory how to be supplied.

held for that purpose, they or the majority of them shall elect and choose one of the candidates, who shall be a proper person, for that purpose, having regard to the directions in the will of the said testator, and to the preference thereby directed to be given to boys of his name and family; that the said trustees, or a majority of them, shall be at liberty from time to time, at any of their meetings, to make and sign orders for payment by the receiver of such annual allowance for the maintenance and education of the person so to be elected as to the said trustees, or the majority of them, shall seem proper; and also to make and sign orders for the investment and improvement at interest of any surplus of the rents and profits of the said charity estates which may at any time be in the hands of such receiver, and of which the application to the purposes of the said charity shall not be immediately required. That the said [*old trustee*] has executed the said indentures of lease and release so settled by the said master.

Power for trustees to make orders for payment of allowances, &c.

Your petitioners, therefore, humbly pray your lordship, that the said master's report of the day of may be confirmed, and that the said charity may be carried on and conducted by the said trustees so appointed by the said master, and all future trustees according to the scheme so approved by the said master; and that the deeds, books, papers, and writings mentioned in the schedule to the affidavit of the said [*old trustee*] sworn in this matter on the day of may be delivered up to the new trustees so appointed by the said master; and that it may be referred back to the said master, Mr. ——— to tax the costs of the petitioners in this matter and incidental thereto, as between solicitor and client; and that the same when taxed may be raised and paid by the said trustees out of the rents and profits of the said charity estates, or that your lordship will be pleased to make such further or other order in the premises as to your lordship shall seem meet.

Prayer.

PETITION *for an Account of Dividends received by the Secretary of a Charity, for the Appointment of a Schoolmaster, and for the Settlement of a Scheme.*

IN CHANCERY.

Between [*the titles of the causes*].

To the Right Honourable the Lord High Chancellor of Great Britain.

The humble petition of [*five persons*], all of, &c. on behalf of themselves and the other inhabitants of the said parish.

SHEWETH,

That, &c. [*the testator's will, and various proceedings in the court of chancery respecting the charity.*]

That H. J. died in or about, &c., and thereupon ——— as sole surviving trustee, did, by a certain deed poll, bearing date the 30th day of October, 1823, appoint W. B. of, &c. to be secretary of the said charity in the place of the said H. J., and the said W. B. has ever since been and now is such secretary as aforesaid to the said charity.

That by an order made in the above-mentioned causes, bearing date the 29th day of November, 1823, [*an order directing the payment of the dividends to the said W. B. until further order.*]

That the schoolmaster to whom the said dividends of the said sum of ——*l.* bank annuities were ordered to be paid, has been dead nearly seven years, and no other schoolmaster has been appointed in his place; and there is not at present any school in the parish of ——— at which the children of poor people are taught as directed by the said charitable bequest.

That notwithstanding the death of the said schoolmaster, the dividends of the last-mentioned sum of ——*l.* bank annuities, which is still standing in the name of the accountant general of the court, to the credit of the second-mentioned cause, the schoolmaster's account, have been regularly applied for and received by the said W. B. under the lastly-hereinbefore stated order, and have been retained by him, and are, as your petitioners believe, now in his hands.

That the sum of ——*l.* the produce of part of the said funds which was in the hands of the former secretary ——— at the time of his death, was also some time since received by the said W. B. as such secretary as aforesaid from the representatives of the said ———, and has ever since, as your petitioners believe, been retained by the said W. B. and is now in his hands, and has never been appropriated to any of the charitable purposes aforesaid.

That, &c. [*statement of the non-application of certain sums to charities directed, and the receipt and retainer of other dividends by W. B.*]

That your petitioners are advised and submit that the scheme so settled and approved of by the master as aforesaid, and confirmed by the said hereinbefore stated order, bearing date the 24th day of July, 1774, is not a just application of the surplus income of the aforesaid charity funds, nor conformable to the directions of the said testator, inasmuch as so great a portion of the dividends is thereby appropriated for the benefit of the secretary of the said charity.

That the said dividends so received and retained or not

applied by the said W. B. as aforesaid, do amount to a considerable sum, and that such receipt and retainer thereof by the said W. B. were wilful and improper; and that the said W. B. has derived great advantage therefrom, and ought to be charged with interest at *5l. per cent. per annum* on all sums of money from time to time remaining in his hands.

That your petitioners have long been and now are parishioners of the parish of ————, and that there are very many poor labouring men in the said parish, having large families of children, and that the re-establishment of a school to teach the children of such poor men, according to the directions of the said testator, would be of great benefit to the said parish.

That the dividends of the said sum of ——*l.* together with the sums accumulated in the hands of the said W. B. as aforesaid, might and ought to be applied in some useful and beneficial charity for the good of the said parish.

That the said ———— who was appointed a trustee of the charity under the order of this court, departed this life in the year 1830; and that he never did in his lifetime appoint any trustee, and that no person has been since appointed trustee of the said charity; and your petitioners are unable to ascertain in whom the office of such trustee has descended and is now vested under the said will of the said testator.

Your petitioners therefore most humbly pray that it may be referred to the master to whom the cause stands referred, to take an account of the sums of money received by the said W. B. since his appointment as such secretary to the said charity as aforesaid from or in respect of the dividends of the said sum of ——*l.* three *per cent.* consolidated bank annuities now standing in the name of the accountant general to the credit of these causes, the schoolmaster's account; and also of the dividends of the said sum of ——*l.* now standing in the name of the said accountant general in trust in the said second-mentioned cause; and also of the sums of money received by the said W. B. for or on account of monies, part of the said charity funds, in the hands of the said H. J. at the time of his decease; and also an account of the payments and disbursements of the said W. B. for and on account of the said charity; and that the said master may be directed in taking such accounts as aforesaid, to ascertain and state what balances have been from time to time in the hands of the said W. B.; and that the said W. B. may be charged with interest on all such balances at the rate of *5l. per cent. per annum* during the time the same respectively have been retained by him; and that the said W. B. may be removed from being such secretary as aforesaid; and that it may be referred to the master to approve of a proper person as a schoolmaster to

Prayer.

teach the poor children of the said parish according to the directions of the will of the said testator; and that your petitioners may be at liberty to propose persons for such offices and also a scheme for the application of the arrears of the dividends that have accrued in respect of the said sum of ——*l.* three *per cent.* bank annuities so standing to the credit of the schoolmaster's account as aforesaid, and the future dividends thereof; and that it may also be referred to the said master to approve of a proper scheme for the application of the accrued and future dividends of the said sum of —— bank annuities so standing to the credit of the second-mentioned cause as aforesaid; and that your petitioners may be at liberty to propose such scheme or schemes accordingly, and that it may also be referred to the said master to approve of a proper person or persons as trustee or trustees of the said charity, or to inquire in whom the office of such trustee is now vested under the said will; and that all proper and necessary directions for the purposes aforesaid may be given, and that the said W. B. may be ordered to pay the costs of this petition, or that your lordship will make such other order in the premises as shall be just. And your petitioners will ever pray, &c.

Forms of Schemes for the future Regulation of Charities (*a*).

Scheme *for the future Regulation and Management of the Charity founded by Henry Alnutt, Esq.* (*b*), *and the*

(*a*) It is obvious that in framing schemes the attention must be chiefly directed to the intention of the donor and the particular directions contained in the order of the court; it is conceived, however, that the insertion of some forms of schemes may be of some use to those who have the management of charities. A scheme forms part of the master's report, to which objections, and afterwards exceptions, may be taken. The commencement of the exceptions may be as follows, after stating the title of the cause:—"Exceptions taken by the informant [*or other party objecting*] to the general report of, &c. one of the masters of the high court of chancery, to whom this cause stands referred by the decree made therein, on ——, whereby it was referred to the said master to settle and approve of a proper scheme for the future regulation of the charity therein mentioned, and which report bears date, &c. For that the said master in his said report, and the schedule thereto containing the scheme approved by him for the future management of the charity founded by the will of, &c. [*as the case may be*]; and for the application of the accumulated funds and the future rents and profits of the charity estates and premises has by the —— clause of the said scheme directed that, &c. whereas the informant insists, &c."

(*b*) The testator by his will, dated 8th January, 1724, [*the substance of which is stated for the purpose of showing how far the*

Estates and Funds belonging thereto, and for the future Application of the Income of the said Charity.

Firstly, That from time to time, when either of the three trustees of this charity shall die, or become unwilling or incapable to act in the trusts thereof, the surviving or other trustees shall immediately meet and choose some fit and proper person to be a trustee in the room and place of the trustee so dying, or becoming unwilling or incapable to act; and that immediately on every such choice the trust estates

Provision for the appointment of new trustees.

scheme follows it] gave estates in *Oxfordshire*, and personal estate to a trustee and his heirs, in trust to pay 100*l.* yearly towards the discharge of poor prisoners out of the Marshalsea prison, in the borough of *Southwark*, whose debts should not exceed the sum of 4*l.*; and the testator directed the rest of his estate to be disposed of in building and endowing an almshouse in the parish of *Goring* for twelve poor men, who should have 8*l.* *per annum* paid unto each of them quarterly, one of whom was to be chosen by the executor to read the common prayer of the church of *England* every morning and evening to the rest, and for so doing, to have 40*s.* *per annum* besides his 8*l.* Six of the said twelve men were be chosen out of the said parish of *Goring*, one out of the parish of *South Stoke*, two out of *Checkindon*, two out of *Cossington*, and one out of *Ipstone*, in *Oxfordshire*, to be named and recommended to the executor by the churchwardens and overseers of the poor of each of the said parishes respectively, which said almsmen should continue in the said almshouse for their lives, unless they should be discharged for any misdemeanors committed; and upon the discharge of any such almsmen, the churchwardens and overseers of the poor of the parish from whence he was chosen should nominate and recommend one other person to fill up the said vacancy, and so from time to time as any place should become void. The testator directed the almshouse to be kept in repair out of his estate, and gave the rest of his estate in trust to place poor children apprentices out of the said parishes of G., S., I., C., and C. in such manner and proportion as his said trustee should think fit. And the said testator directed his executor, at any time during his natural life, by any writing under his hand and seal, to appoint three sufficient persons to take upon them the trusts aforesaid, after his decease, in as large and ample a manner as the said executor had authority to act, which said persons so to be nominated, upon the death of any one of them, should have power, within three calendar months after the death of any one of them, to appoint one other fit person to have the like authority with them; and so from time to time, upon the death of any one of the said trustees, the survivors should have like power from time to time to appoint one fit person to complete the number of three, who should have the same power to perform the trusts aforesaid. And the said testator directed that the trustees should deduct yearly for themselves 5*l.* a piece for their trouble in executing the trusts. And the trustees were directed to account yearly for all such money as they should receive or disburse under the trust unto the rector of C. for the time being and the vicar of G. and their successors, whose allowance should be a final discharge.

The master found, by his report, dated 29th August, 1833, that the real income of the said charity at that time amounted to the sum of 1,173*l.* 19*s.* 8*d.* *per annum*.

shall be effectually conveyed and assured, so that the same may vest in such new trustee jointly with the surviving or continuing trustees.

Regulation as to leases to be granted.

Secondly, That the trustees for the time being shall from time to time let and demise the several farms, part of the trust estates, at the best annual rent or rents that can reasonably be obtained for the same, and for any term or number of years not exceeding twenty-one years in possession, but not in reversion, and without taking any fine on the granting of any such demise. That the lessees shall, if required by the trustees, execute counterparts of the leases to be granted to them respectively, and shall therein covenant with the trustees for due payment of the rent and proper cultivation of the land, and for doing such repairs as by the custom of the country, or agreement with the tenants, they may be liable to do; and that the lessees shall also, if required by the trustees, give sufficient security for the due payment of the rent and performance of the covenants to be reserved and contained by and in such leases respectively (*c*).

Thirdly, That the cottages and dwellings, (except the chaplain's house, and the house which has been hitherto used by the trustees of the charity for their meetings,) other parts of the said charity estates, shall be demised or let at

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(*c*) The scheme in the *Attorney General* v. *Corporation of Newark*, contained the following provision for letting the estates:—That the said charity estates shall in future be let at the town hall of the borough of *Newark*, and not in the said parish church of *Newark*; and that the same shall be let from time to time on leases, on terms not exceeding twenty-one years, for the best rents that can be had or obtained for the same, without any fines or premiums being received for such leases; and upon such terms and with such covenants as may be recommended by the report in writing of some competent and disinterested land surveyor; and that public notice be given by advertisements in the public papers that circulate most extensively in the counties of *Nottingham*, *Leicester*, and *Derby*, and by hand bills to be distributed in the said town of *Newark*, and in the vicinity thereof, of the time and place of letting such estates; and that proper security be taken from the lessees for the payment of the rents to be reserved by such leases, and the performance of the covenants to be contained in such leases on the part of the lessees; and that all such lessees be required to execute counterparts of their respective leases. (Reg. lib. A. 1833, fol. 1048; order confirming report, dated 24 March, 1834.)

the best and most improved annual rents that can be reasonably obtained for the same.

Trustees not to take leases.

Fourthly, That no trustee of the said charity estates shall at any time, either directly or indirectly, accept a lease of, or hold or occupy any part of the property belonging to the said charity for his own benefit, or for the benefit of any other person or persons (*d*).

Woodward to be employed.

Fifthly, That the trustees shall be at liberty from time to time, when they shall deem it expedient, to employ a proper person, at the expense of the trust estate, to survey the different woodlands, part of the said trust estate, and to give the requisite and proper directions to the bailiff or woodward of the said charity for the management thereof; and as to the wood and timber to be cut and felled in each season.

Sixthly, That such wood and timber, when so cut and felled, with lops, tops, and bark, shall be sold at such times and in such manner and upon such terms as the trustees from time to time shall think fit to direct.

Receiver to be appointed.

Seventhly, That the trustees for the time being shall be at liberty to elect some fit and proper person, not being one of their own number, to be receiver of the rents and profits of the said charity estates and property, consisting of tenements, lands, and wood; and that such receiver shall give sufficient security for duly accounting for and paying the monies which may come to his hands, and for the faithful performance of his duty; and such receiver may be remunerated for his trouble by the trustees out of the rents and profits of the said estates, provided that such remuneration do not exceed 5*l. per cent.* upon the amount of the sums received.

Accounts to be kept by receiver.

Eighthly, That the receiver for the time being shall keep a regular account of his receipts and expenditure in respect of the said charity estates, and that such accounts shall be made up and audited by the trustees at their meetings to be holden in the month of July in every year.

Trustees to keep accounts.

Ninthly, That the trustees of the said charity shall cause a regular account to be kept of the receipts and disbursements in respect of the said charity; and that the account for each year shall be made up and transmitted to the auditors hereinafter appointed, or one of them, on or before the last day of July in every year; and shall, before the end of the month of August, in every year, be examined by such auditors, in the doing whereof they are not only to ascertain by all means in their power the correctness of the several items of receipts and payments stated therein, but are to require the production to them of regular vouchers for the

(*d*) *Ante*, pp. 707, 708.

payments, and to inquire into the propriety of the payments, and the occasion and circumstances of extraordinary expenditure (if any), and of any losses or reduction of rents, or purchase-money of timber or wood, and to ascertain the balance remaining in the hands of the trustees, or either of them, or of the receiver; and the trustees are hereby required to give all the assistance and information in their power to the auditors on such yearly examination of accounts; and after such examination shall have been had, the allowance of the accounts by such auditors shall be final and conclusive.

Vouchers to be preserved.

Tenthly, That regular vouchers for the expenditure by the trustees shall be carefully preserved among the documents belonging to the trustees.

Eleventhly, That if, on auditing any account, it shall appear to the auditors that there is in the hands of the trustees, or either of them, or of the receiver, any sum of money beyond what is required for the ordinary purposes of the charity, and that the same cannot, either from the want of candidates or other cause, be applied in apprenticing, the auditors shall give directions, in writing, for the investment of such sum by the trustees.

Investment of surplus income.

Twelfthly, That the trustees, as soon as conveniently may be after any such direction shall have been given by the auditors, shall, in pursuance of the order to be made on the hearing of the cause, *Attorney General* v. *Morland*, for further directions, or of an order in that cause to be obtained for the purpose, cause the sum so directed (the amount thereof to be verified by affidavit) to be paid into the bank, with the privity of the accountant general of the court of chancery to the credit of the said cause; and they shall cause the same to be invested in the purchase of bank 3*l.* per cent. annuities in the name of the said accountant general, in trust in that cause, the receipt and voucher for payment and investment to be produced at the next quarterly meeting of the trustees.

Auditors of accounts.

Thirteenthly, That there shall be two auditors of the accounts of the trustees, and the rector of C. and the vicar of G. respectively for the time being shall, in conformity with the directions in the will of *H. Alnutt*, be the auditors, provided they shall be resident on their respective livings, and be willing to act; but in case of the vacancy of either of the said livings, or in case of the non-residence or refusal to act of either of them, the said rector and vicar, then the rector of W. for the time being, if then resident on his living, and willing to act, shall be one of such auditors; but in case of the vacancy of that living, or if the incumbent thereof shall be non-resident, or unwilling to act, or in case neither of the

incumbents of C. and G. shall be resident on his living and willing to act, then the vicar of I. for the time being, if then resident on his living and willing to act, shall be the other of such auditors.

Particulars of estates with scheme.

Fourteenthly, That a particular description of the charity estates, with the scheme for the regulation and management thereof, and for the application of the income of the charity, shall be entered in a book, which shall be kept, together with the deeds, papers, leases, and documents belonging to the said charity, in a chest, to be deposited in some secure place, to be agreed upon by the trustees, to which chest there shall be two separate and different locks, the keys of which shall be kept by two of the trustees.

Fifteenthly, That a memorial, or short account of the said charity, and the estates and funds applicable to its support, shall be painted on board, and fixed up in some suitable and conspicuous place in the parish church of *Goring* aforesaid; and such board, and the inscription thereon, shall always be kept clear and legible at the expense of the said charity.

Repair of almshouses.

Sixteenthly, That the almshouses belonging to the charity, and erected in pursuance of the will of the said testator, and the chapel and chaplain's house, and buildings also belonging to the charity, shall be kept in good repair and condition by the trustees out of the income of the charity property.

Regulations as to burial-ground.

Seventeenthly, That the burial-ground adjacent, and belonging to the said chapel, shall be appropriated to and used only for the interment of inmates of the almshouses, or children belonging to the school, except in the case of a wife or widow of an almsman, by the permission, in writing, of one of the trustees; and no deduction is to be made out of the allowances of the almsmen under this charity in the shape of burial money, as heretofore has been the case, but the trustees are to be at liberty, in such cases where they shall think fit, to defray the expenses of the burial of such almsmen out of the funds of this charity.

Allowance of wood to objects of charity.

Eighteenthly, That the wood to be allowed from the said charity estate for the use of the chaplain, almsmen, and nurse, shall be furnished to them in such quantities, in such manner, and under such regulations as the trustees shall from time to time direct and appoint.

Election of almsmen.

Nineteenthly, That whenever a vacancy shall arise in the almshouses, the churchwardens and overseers of the poor of the parish named in the said will of the testator, from which the person whose death or dismission shall cause the vacancy shall originally have been sent, shall nominate and recommend to the trustees one of the most deserving industrious poor men in their parish to fill such vacancy, and to reside in the almshouse so become vacant, such poor man being one

that has never received parochial relief, or has been the longest without having received such relief; but in no case shall any person be recommended to the trustees to fill any such vacancy, who at the time of his nomination shall be in the receipt of parochial relief, or who having been in such receipt, shall for the purpose of enabling him to be nominated for the benefit of the said charity, colourably, or for a short time only, have ceased to receive such parochial relief, unless there shall not at the time be any other person in such parish eligible to such vacancy.

Twentiethly, That the nurse to the almsmen shall be from time to time chosen and appointed by the trustees.

Election of children to the school.

Twenty-firstly, That the trustees for the time being shall elect and choose the children out of the five parishes in the said will mentioned, that are either to be apprenticed or educated at the school in *Goring*, giving a preference to the children of the most deserving poor persons in such parishes.

Trustees may make rules.

Twenty-secondly, That the trustees shall be at liberty from time to time, as often as they shall see occasion, to make rules and orders for the internal management of the said almshouses and school, and for the good government of the inmates of the almshouses and the boys in the school.

Power for trustees to remove objects of charity.

Twenty-thirdly, That the trustees shall have from time to time full power and authority to remove and displace any person from the said almshouses or from the school, who shall wilfully transgress such rules or orders, or be guilty of other misconduct.

Regulations respecting chaplain.

Twenty-fourthly, That the chaplain of the said almshouses shall be elected by the trustees, and shall reside in the house appropriated for his use, and do the duty attached to the chapel at all times, and he shall, in the absence of the trustees, have the superintendence and control of the persons in the almshouses and school, and see that the existing rules and orders, for the management and government thereof, are strictly complied with.

Twenty-fifthly, That the chaplain shall be at liberty, subject to such regulations as shall be from time to time prescribed by the trustees, to require such of the almsmen as are not disabled by infirmity to employ themselves as there shall be occasion, in keeping the paths, walks, grass-plats, and hedges about and belonging to the almshouse and school premises in neat and proper order, so that such almsmen be not employed in any hard labour or work beyond their strength.

Clothes to be supplied.

Twenty-sixthly, That it having been customary for many years past to supply the almsmen and the nurse with new coats or clothing once in every two years, and the boys in the school every year, similar supplies of clothing shall be furnished out

of the charity funds, under the direction of the trustees, annually or otherwise as they shall think fit, they being at liberty from time to time to make such alterations in such clothing as to them shall seem proper.

Medical man may be employed.

Twenty-seventhly, That the trustees shall be at liberty, when it shall appear to them requisite, to employ a medical man to attend any of the inmates of the said almshouses, and they are to be allowed what they may pay such medical man in their yearly accounts, so as that such allowance do not in any one year exceed the sum of 20*l.*

Residence for schoolmistress.

Twenty-eighthly, That the house in the parish of *Goring*, which has been hitherto used by the trustees of the charity for their meetings, shall in future be appropriated and used for the residence of a schoolmistress and for a school for girls.

Twenty-ninthly, That a schoolmistress shall be from time to time chosen and appointed, and a salary not exceeding the annual sum of 20*l.* allotted to her by the trustees; that the trustees for the time being shall elect and choose such a number of girls, to be instructed in such school, as it shall appear to them can fairly and properly be taught by such schoolmistress, therein giving a preference to girls of the five parishes in the said will mentioned, and to such as are the children of the most deserving poor persons in such parishes; but in case the full number cannot be obtained therefrom, the trustees are to be at liberty to elect and choose girls, the children of deserving poor persons of the parish of W., part of which is immediately adjoining to *Goring* heath.

Meetings of trustees.

Thirtiethly, That a general meeting of the trustees shall be holden once in every quarter of a year, or oftener if the trustees or either of them shall deem it expedient, for the purpose of receiving applications, and of determining on proper objects on whom the benefits of the said charity may be bestowed; and also for the purpose of inquiring into the conduct of the inmates of the almshouses, and the conduct and progress of the boys in the school, and of receiving and considering reports as to repairs of the respective buildings, and for the general management of the affairs of the charity.

Thirty-firstly, That if, at any such meeting, two trustees only shall be present, they shall be competent to act in all matters relating to the trust.

Power to build additional almshouses.

Thirty-secondly, That if at any time hereafter it shall appear to the trustees for the time being that, in consequence of the increase of the funds of the charity, and consistently with a due regard to the different existing branches and objects thereof, it will be for the benefit of the poor in the several parishes of [*named in the will*] that an increased number of almshouses should be erected, and poor men placed therein, or that any other mode of extending the benefit of the charity,

in accordance with the intentions of the said testator, should be adopted; the said trustees shall be at liberty from time to time, under the provisions of the order of the court of chancery, to be made on the hearing of the cause, *Attorney General* v. *Morland*, for further directions, or of any other order to be obtained in that cause for that purpose, to lay proposals before the master to whom the said cause may be transferred for his consideration and opinion, and for the purpose of obtaining the direction of the court thereon.

Application of the income of the charity.

Thirty-thirdly, That the rents, profits and income of the charity estates shall be, from time to time, under this scheme expended by the trustees in manner hereinafter mentioned, (*viz*). In the repairs of the charity estates, and in insuring the buildings thereon against loss by fire. In payment of the surveyors and receivers' salaries and allowances, and in the other necessary expenses attending the management of the said estates, and the execution of the trust. In payment to the bailiff or woodward of the said charity, for his services in such charity, any wages not exceeding the yearly sum of 30*l*. In applying the yearly sum of 120*l*. towards the discharge of poor prisoners out of the *Marshalsea prison*, in the borough of *Southwark*, whose release can be effected for a sum not exceeding 15*l*. for each, the trustees taking the best care they can that the most deserving of the prisoners have the benefit of this branch of the charity. In payment of a weekly stipend of such amount as the trustees in their discretion shall think fit to each of the almsmen residing in the almshouse, so as the stipend to each almsman shall not exceed seven shillings weekly; the trustees having the power at any time, when it shall appear to them expedient, by reason of the bodily or mental infirmity of any of the almsmen, to cause them to be supplied with articles of food or other necessaries to the amount of their respective stipends in lieu of payment thereof in money. In payment of a yearly sum of 5*l*. by quarterly payments to one of such almsmen, to be selected by the trustees from time to time, for officiating as clerk in the chapel, and reading prayers to the other inmates of the said almshouse every morning and evening except on such occasions when divine service is performed in the chapel by the chaplain. In payment of the wages of a proper person to act as nurse to the almsmen, so as such wages do not exceed the yearly sum of 25*l*. In providing clothing for the almsmen and nurse, and for so many of the boys in the school at *Goring*, not exceeding thirty in number, annually or otherwise in such manner and of such description as the trustees shall see fit. In payment for a dinner for the almsmen and such others as the trustees may direct yearly on a meeting of the trustees, such dinner to be in commemoration of the

founder, so as the expenses thereof do not at any time exceed the sum of 20*l.* In payment of a medical attendant for his services in attending any such persons in the said almshouse when his attendance shall be required by the trustees or the chaplain, any sum not exceeding 20*l.* in any one year. In payment of a yearly stipend to the chaplain and schoolmaster of an amount not exceeding 100*l.* for his services as chaplain officiating in the chapel of the almshouse regularly every Sunday, and performing the duties of schoolmaster in instructing the boys in reading, writing, and the first rules of arithmetic, and superintending the affairs of the charity in the absence of the trustees, the trustees permitting the said chaplain to live in and enjoy the dwelling house and premises at present assigned to the chaplain, free of rent, and also free from taxes and rates, which are to be paid out of the charity funds. In payment of an assistant to the schoolmaster whenever the trustees shall deem it expedient that one should be appointed, of a yearly stipend of an amount not exceeding 50*l.* a-year, for his care and pains to be bestowed in assisting in teaching the boys reading and the first rules of arithmetic. In payment to a schoolmistress of a yearly stipend of an amount not exceeding 25*l.* for her care and pains to be bestowed in teaching the girls in the school to be established as aforesaid. In payment to each of the said schoolmasters in the parishes of C. and J. such respective sums, not exceeding 10*l.* each yearly, as the trustees shall deem proper for the services of such respective masters in teaching such number of children of those parishes respectively, and in such learning as the trustees shall from time to time direct and appoint. In retaining to themselves the said trustees the sum of 10*l.* each, and in payment to each of the auditors of the sum of 2*l.* 2*s.* to indemnify the said trustees and auditors for any expense they may be put to in travelling from their respective residences to the almshouse or other part of the charity estates, in the affairs of the charity, and in promotion of the welfare thereof. In retaining the annual sum of 30*l.* to be invested in the purchase of stock in the public funds in the names of the three trustees, so that the said annual sum and the dividends of the stock, to be from time to time purchased, may be accumulated, and may form a reserved fund to be applied, when occasion may require, in the rebuilding or extraordinary repairs of the almshouse, chapel, houses, and buildings belonging to the charity estates, provided that when by the means aforesaid such reserved fund shall amount to the sum of 500*l.*, and so long as the same shall continue unreduced by such extraordinary expenditure as aforesaid below that amount, the trustees for the time being shall be at liberty, if they think fit, to reduce the said annual sum of 30*l.*, or wholly to refrain from making any addition to such reserved

fund, except by the investment of the dividends thereon. And in applying the residue in payment of premiums on apprenticing poor children of inhabitants of the several parishes of [*those mentioned in the testator's will*] or in providing clothes for each child on his or her being apprenticed to some trade or calling, or partly in payment of premiums and partly in providing clothes, the amount of premiums to be paid, or sums to be expended, and the times and proportions at and in which such premiums shall be paid, or sums expended, being in each case to be determined by the trustees at one of their meetings to be holden as hereinbefore directed (*e*).

SCHEME *for the Regulation of a School.*

In the matter of the *Preston School*, in the Town and Parish of *Stokesley*, in the County of *York*.

IN PURSUANCE of an order, bearing date the seventh day of August, 1833, made in this matter upon a petition of [*names*], being seven of the trustees and overseers of the said charity school, I have been attended by the solicitors for all the trustees of the said charity, and have proceeded in the matters referred to me by the said order, with respect to which matters the affidavits after mentioned have been laid before me; (that is to say,) an affidavit of the Rev. L. V. H., rector of *Stokesley* aforesaid, sworn in this matter on the thirtieth day of January, 1834, and an affidavit of, &c., sworn by them respectively in this matter on the thirteenth day of February, 1834, and an affidavit of, &c.; and I find that the sum of 27*l.* 13*s.* 3*d.*, over and above the sum of 160*l.* 9*s.* in the said petition mentioned, has been properly laid out in and about the erecting and building the *Preston* school; and I certify, that in my opinion it is fit and proper that the above-named petitioner R. H. should continue a trustee of the charity funds in the said petition mentioned; and I further certify, that having under the said order considered a proposal laid before me on behalf of the said L. V. H. (who, in his character of rector of the said parish of *Stokesley* is, under the founder's will, perpetual trustee of the said charity,) and another proposal laid before me on behalf of the petitioners in this matter hereinbefore respectively named; and having, with reference to the said affidavits, revised the scheme approved of by me in and by my former report, bearing date the fifteenth day of March, 1831, I have thought fit to make certain alterations in and additions to the said scheme, and finally have approved of the altered and amended scheme set forth by way of schedule to this my report. All which, &c.

(*e*) *Attorney General* v. *Morland*, Reg. lib. A. 1833, fol. 277.

The Schedule referred to by the foregoing Report.

Rule 1st. That this charity shall henceforth be designated "The Preston School."

2nd. That the entire direction and management of the school shall be vested in the rector, the churchwardens, and the overseers of the poor of the township of *Stokesley* for the time being, together with the trustees in whose names the funds of the charity shall for the time being be invested.

3rd. That the several persons so appointed to manage the school shall be styled trustees and overseers of the said school, and shall form a committee invested with full authority to establish such rules and regulations as may appear to them most likely to benefit the school, provided they do not contravene those which shall or may have received the sanction of the lord chancellor.

4th. That the committee be empowered at their next general meeting, to be held in January, 1835, to appoint two trustees of the charity funds in addition to the three trustees already appointed, and upon the death, resignation, or disqualification of any one or more of the trustees already appointed or to be appointed, the committee for the time being shall have power, at the general meetings to be held in January in each year, to appoint another trustee or other trustees in his or their stead, such trustees not at any time to exceed five or to be fewer than three in number, and of whom the lord of the manor of *Stokesley* for the time being shall be one, unless he should object thereto.

5th. That in case of a difference of opinion, all questions shall be determined by the major part of those present at the meeting, and if they are equally divided, the chairman shall give a casting vote.

6th. That if a convenient opportunity should occur of purchasing a house as a residence for the master of the school, the committee shall have the power of applying to the lord chancellor in respect thereof as they may be advised, and of appropriating to such purchase such part of the funds of the charity as his lordship may think fit to order for that purpose.

7th. That there shall be a master qualified for teaching the classics, mathematics, reading, writing, and arithmetic, and an under master or usher qualified to teach the three latter branches of education (*f*).

(*f*) The following will apply in some cases of grammar schools: That in addition to the learned languages, the master shall be at liberty to teach in the said school, writing, arithmetic, and the elements of mathematics to such of the scholars and at such times as he may deem convenient, but so as the same scholars be not thereby left insufficiently instructed in the Latin and Greek, to the prejudice of the establishment as a classical school.

8th. That it shall be the business of the master, with the assistance of the under master or usher, regard being had to the qualifications required of them by the preceding 7th rule, to teach the classics, mathematics, reading, writing, and arithmetic, to the children of such persons as are able and willing to pay in part for their education (the rate of charges to be paid to the master for such education being fixed by the committee), and also to teach the same several branches of education (or such of them as the committee may from time to time direct) to such twelve poor children or more or less, the number to be fixed by the committee, belonging to the parish of *Stokesley* (the children belonging to the township of *Stokesley* being nevertheless first preferred) whose parents may in the judgment of the committee be thought so poor as not to be well able to pay for themselves.

9th. That independently of the profits to be derived by the master from teaching the classics, mathematics, reading, writing, and arithmetic, according to the last rule, he shall be allowed an annual salary of 130*l.* to be paid half yearly, so soon as the dividends of the stock in which the charity funds shall be invested shall be received, and out of which salary he shall pay to the under master or usher such an annual sum as shall from time to time be fixed by the committee.

10th. That in case a house shall hereafter be purchased as a residence for the master according to the 6th rule, there shall thenceforth be deducted from his salary, such a yearly sum as the committee shall think proper, and the master shall also be at the expense of keeping such house in repair, and shall pay all taxes and assessments in respect of it.

11th. That once in every half year the boys shall be publicly examined in the several branches of education, and the best rewarded for their proficiency by prizes, for which purpose the sum of 5*l.* shall be set apart out of the dividends of the charity fund every year.

12th. That the surplus dividends of the stock in which the charity fund is or may hereafter be invested shall form a fund for repairs and improvements, and the trustees shall be justified in paying for such repairs and improvements ordered by the committee out of that fund, but they shall not touch the capital without the order of the lord chancellor on a special application to his lordship for that purpose.

13th. That in the course of the month of December in each year, the rector of *Stokesley* for the time being shall summon or cause to be summoned, by a written notice to be personally served on each of the other members of the committee, or left at their respective places of abode, a general meeting to be held on some day not earlier than the 15th or later than the 30th day of January then next following, at

which meeting the trustees of the charity funds shall produce their accounts to be audited, and such accounts shall not be considered as allowed so as to discharge the accounting party till they shall have been signed by the major part of the members of the committee present at the meeting, the chairman having a casting vote; but if from absence from *Stokesley* or any other cause, the rector for the time being shall omit to summon or call such general meeting, then it shall be lawful for any four of the committee for the time being, on or after the 1st day of January in each year, to summon or call such general meeting by personal notice on the several other members of the committee, or by leaving the same as to the rector at the rectory house in *Stokesley*, and as to the other members of the committee at their respective places of abode, such notice to be given ten days at least previously to such meeting being appointed to be held.

14th. That it shall be lawful for any four members of the committee for the time being, from time to time, as and when they shall see fit, to summon or cause to be summoned by written notice to be personally served on the remaining members of the committee, or to be left as respects the rector for the time being at the rectory house in *Stokesley*, and as respects the other members of the committee at their respective places of abode, a special meeting for the transaction of such business connected with the due regulation and management of the said charity and its funds, as may from time to time arise, the object and purpose of each such meeting to be shortly stated in the notice thereof to be so given. And it shall be lawful for the members present at each such meeting to transact all such business as shall be specified in the notice thereof to be so given, and if necessary, to adjourn such meeting to some future day or days as often as occasion may require, the notice of each such meeting to be given fourteen days at the least previously to the day appointed for its being held.

15th. That the rector of *Stokesley* for the time being shall be the chairman at all meetings of the committee, but in case of his absence from any meeting, then the chairman shall be chosen by a majority of members present at any such meeting, and in case of the members being equal the members present shall draw lots for a casting vote, which casting vote shall determine the election of such chairman.

16th. That the committee shall have the appointment of the masters so often as there shall be occasion for it, but no one shall be appointed without previously producing a certificate, in the handwriting of the rector for the time being, that he has been examined and is duly qualified for the office.

17th. That the committee shall have the power of removing

any master for misconduct or irregularity, and the master so removed shall forthwith quit the possession of the schoolroom and premises, and shall lodge the keys at the rectory house in *Stokesley*, to be kept by the rector till the appointment of a new master.

18th. That whenever the committee is mentioned in these rules, the decision of the major part of them present at any meeting is to be understood, and the chairman in case of the votes being equal shall have in addition a casting vote (*g*).

DIRECTIONS *in the Scheme of a Grammar-school.*

1st. That the grammar-school master shall have a salary of *l. per annum*, and shall also have the assessed taxes and necessary repairs of the school house and premises paid and allowed out of the rents of the said trust estates, such taxes and repairs having been usually paid and allowed in addition to the salary of the grammar-school master; and that such salary shall be paid quarterly; and that the system of education in the said school shall entitle the free scholars, who are taught the classics, to be also taught English grammar, writing and arithmetic, without any charge or further salary in respect thereof; and that such scholars shall not be admitted or admissible into such school until they shall have attained the full age of eight years. And that a schoolroom be erected on part of the ground belonging to the grammar-school for the purpose of teaching English, writing and arithmetic, and that the sum of *l.* and no more be expended in the erecting such room. And that an additional usher be appointed by the master of the said school for the purpose of teaching English, writing and arithmetic, at the annual salary of *l.*

2nd. That an usher or assistant be appointed under the said grammar-school master, with an annual salary of *l.* the said usher being allowed *l. per annum* from the funds of other estates, and that the head master shall have the nomination and appointment of such usher or assistant, who shall be a member of one of the universities, or otherwise well qualified for the duties of the office, of the established church, and that such salary shall commence from the period of such appointment being made, and shall be paid quarterly.

(*g*) *In re Preston School.* The above rules and regulations were absolutely confirmed by the court, 29th July, 1834. Reg. lib. B. 1833, fol. 1255.

DIRECTIONS *in a Scheme as to Exhibitions for Two Boys to be sent from a Grammar-school to either of the two Universities.*

That a sufficient part of the rents and profits of the said charity estates shall be set apart at the half-yearly receipts of the rents and profits of the charity estates, for the purpose of paying the several sums of 80*l.* and 80*l.*, and carried by the receiver of the charity estates to a distinct account, to be called the exhibition account; and that payment of the said exhibitions shall be made to the persons entitled thereto by half-yearly payments, (that is to say) on the 12th day of January and 12th day of July in each year; and that the mayor and aldermen, vicar and four churchwardens for the time being of the said town of N. or the major part of them for the time being, shall have the right of electing the said exhibitions, but that previous to such election the said electors shall call to their assistance such person or persons as the archbishop of *York* for the time being shall from time to time appoint, for the purpose of examining before them such boys as may be candidates for the said exhibitions, with respect to their classical learning and fitness for such exhibition; and that the person so to be appointed shall be paid his reasonable expenses out of the rents of the said charity estates, not exceeding ten guineas. That the first election of such exhibitions shall take place on the day of now next ensuing, and that boys whose education at the said school may have ceased since the day of , 1830, shall be eligible on such first election as well as boys now in a course of education at the said school; and that fourteen days previous to such and every future election, the master of the said grammar-school shall deliver or cause to be delivered to the said several electors of such exhibitions, a certificate of the names and ages of all the boys in the said school or who may have ceased to belong to the said school since the said day of , 1830, who in his opinion shall appear to be proper candidates for such exhibitions. And that no boy shall be competent to be elected to the said exhibitions who has not been educated in the said grammar-school of N. during the space of three years at the least, nor until he has attained the age of seventeen years, and that such exhibitions shall be continued to such boys as shall be elected thereto for the space of four years, from the time they shall become members of the college in which they may be admitted, and provided they so long continue to be resident members of such college.

SCHEME *for the application of a Sum of Stock given by Will, dated April*, 1791, *for the support of a School* (*h*).

That the school so established at *Ketton* shall be permanent, and be considered as founded and endowed under the will of the said testatrix, for the purpose of educating poor female children, born of parents residing in the said parish of *Ketton*, in useful knowledge suitable to their stations in life, and for instructing them in habits of industry and in religious and moral principles; and the same shall be carried on at such place within the said parish, and in such manner as the trustees hereinafter named shall direct. That the said 1000*l.* 3 per cent. reduced annuities, shall remain in the name of the accountant general of the court of chancery, in trust in this cause, and the interest or dividends thereof shall be paid by him to the vicar of the said parish of *Ketton* for the time being, for the purposes hereinafter mentioned. That the Rev. , the vicar of *Ketton*, and , a justice of the peace for the said county, shall be the present trustees of the said charity; and in all future times the vicar for the time being of *Ketton* aforesaid, shall be one of the trustees of the said charity, and that the said [*justice*] and [*vicar*], and any other of the trustees of the said charity for the time being, shall and may as often as circumstances may require, by writing under their hands, nominate and appoint any other person, such person being a respectable justice of the peace

(*h*) The following is the bequest upon which the above scheme is founded:—"I appropriate 1000*l.* reduced annuities, to charity. I desire that this sum may remain for ever secured to that purpose, and that the interest accruing from it, amounting to 30*l. per annum*, may be expended in one of the two following manners: 1st. If a school of industry should be established in the village of *Ketton* in *Rutland*, on a liberal plan, well calculated to promote religion, morality and industry amongst the poor; I desire that this 30*l. per annum*, may be applied to the support of so laudable an institution. 2ndly. If no such school of industry be established in the village of *Ketton* in *Rutland*, or if it be not permanent, I desire that this 30*l. per annum* may be applied to the purpose of well educating poor female children, born in the said parish of *Ketton*, by placing them at a school where they may acquire useful knowledge and habits of industry, and in like moral and religious principles. I request of my sister, A. M. E. during her life, and ever after of the person who shall be vicar of *Ketton* aforesaid, provided he be of respectable character, jointly with a respectable justice of the peace for the county of *Rutland*, to choose the most deserving and necessitous objects, and to see that the money be properly applied according to the spirit of this clause, which has charity for its object."

The master found by his report that there had been no permanent school of industry established at *Ketton*, answering the description in the will; but that A. M. E. named in the will had established a school for educating female children, according to the directions in the will, and that after her death children had been educated at the same school as directed by the will.

of the said county of *Rutland*, to be a co-trustee with the vicar for the time being, in the place of the said [*justice*] or of any other person appointed a trustee under this scheme; and that such writing shall be deposited in the chest of the said parish; but in case it shall happen that there shall be no such nomination and appointment in writing of a trustee as aforesaid, then when the said [*justice*] or any other trustee appointed under this scheme, shall die or decline to act or become incapable of acting in the trusts of the said charity, a new trustee shall be appointed by the vicar and proprietors of land situate within the said parish of *Ketton* assembled in vestry, provided such new trustee be a respectable justice of the peace of the county of *Rutland*. That the trustees for the time being shall from time to time appoint a proper person or persons to be the mistress or mistresses of the said school, with such salary or salaries as by the said trustees shall be deemed proper. That the said trustees for the time being shall appoint poor female children, born in the said parish of *Ketton*, to be taught by such mistress or mistresses, so that they may acquire useful knowledge, and habits of industry, and imbibe moral and religious principles, as directed by the will of the said testatrix. That the said vicar of *Ketton* for the time being shall be treasurer of the said charity; that the said vicar as such treasurer as aforesaid, for the time being, shall keep a regular account of his receipts and expenditure in respect of the said charity, and that he shall pay such salary or salaries at such times and in such manner as the said trustees for the time being shall direct; that such account shall be made up and signed by the said trustees once in every year, and deposited in the parish chest; that the said trustees shall visit the said school and inquire into the conduct of the mistress or mistresses, and into the progress of the children. That the said trustees shall either hire a building or room where the said children may be taught, or make an allowance for the rent to the mistress or mistresses, as they shall see fit. That the said trustees in their discretion shall be at liberty to lay out and expend a small portion of the said interest and dividends in the purchase of school books, and other useful articles, for the purposes of the said school, it being intended that the whole income shall be yearly expended in or about such school. That in order that the existence of the said charity may be always known in the said parish, the trustees for the time being shall cause a board or slab to be put up in the most public part of the parish church, containing a short account of the charity, and an explanation of its object; and that such inscribed account shall be always kept clean, and the board or slab containing the same in good repair, so that all persons frequenting the said parish church

may be enabled to read the said account, and be made acquainted with the intent thereof. That in case the trustees for the time being shall, in the execution of the trust reposed in them, at any time or times differ in opinion, the matter or matters in respect of which they shall so differ shall be referred to the proprietors of land situate in the said parish of *Ketton* assembled in vestry, whose decision in the matter or matters so referred shall be conclusive (i).

SCHEME *for the application of several Bequests given to a Company to be advanced as Loans without Interest to Men free of such Company.*

1st. That so much of the said sum of *l.* mentioned in the said decree, and with which the defendants stand charged, as shall remain after payment of the costs of this suit, be set apart as a fund, to be called "The Loan Fund;" and that the management of the said fund, and all matters incidental thereto, be vested in the court of assistants of the said company for the time being.

2nd. That the said fund be lent or advanced as or by way of loans to poor freemen of the said company, in sums of 100*l.* and upwards, but not exceeding 300*l.*, for five years, without interest, upon bond, with two or three good securities for every sum, to be approved of by the said court of assistants.

3rd. That each applicant for such loans shall at the respective times of the same being made, give a bond with two or three sureties as may be required, whereby they shall become jointly and severally bound to the said company in a penalty of double the amount of the sum borrowed, conditioned for the repayment of the said principal sum within three calendar months from the lending thereof; but the calling in of the said loan is not to be made, nor the bond put in force until the expiration of five years from the date thereof, unless it shall be manifest to the said company, upon good grounds, that any of the obligors or sureties are not responsible, or are unable to satisfy the same, in which case it shall be lawful for the said company to call in the money, and in case of nonpayment, to put the said bond in force, unless the borrower can procure another surety or other sureties of substance, as the case may require and the company shall judge necessary; and in the event of the borrower becoming insolvent, or in distressed circumstances, or in the opinion of the said court of assistants unable to discharge the

(i) *Attorney General* v. *Noel*, Rep. dated 28th May, 1827. Reg. lib. A. 1826, fol. 1321.

said loan, that then it shall be lawful for the said company immediately thenceforth to put the said bond in force against the said borrower and his sureties, or such of them as the said company shall think fit.

4th. That on the death of any borrower before the said five years shall expire, the said company shall call in the money; and in case of nonpayment, put the bond in force against his representatives and sureties, and all persons liable thereon.

5th. That the respective borrowers shall bear and pay all proper and necessary charges and expenses of and attending the making and executing the bonds and all other matters relative thereto.

6th. That a book shall be provided and kept by the clerk of the said company, in which shall be entered the names and residences of the respective borrowers and their sureties, their profession or business, the sums lent, the times of making the loans and when payable, and any other particulars which may be thought material or necessary.

7th. That at the expiration of each and every year of making the said loans, or within 21 days afterwards, the respective borrowers do attend at the common hall of the said company, in order to give in an exact account of the state and circumstances of themselves and of their sureties.

8th. That from and immediately after any of the monies called in shall be received, notice shall be posted up in the common hall of the said company, and advertised in two or more of the *London* daily newspapers of the greatest circulation, that such monies are ready to be advanced on loans to freemen of the said company.

9th. That such part of the said fund as is now in hand shall be immediately in like manner posted up and advertised as ready to be advanced on loans to freemen of the said company.

10th. That all expenses incidental to the carrying this scheme into effect (except such as shall be properly charged to the said borrowers) shall be borne and paid out of the said trust fund.

11th. That the articles of this scheme shall be printed and put up in the hall of the said company.

12th. That the said book shall be open to the inspection of all or any of the members of the said company at all seasonable times without expense (*k*).

(*k*) *Attorney General* v. *Haberdashers' Company*, 23 Dec. 1834; absolutely confirmed, 16 Feb. 1835. Reg. lib. A. 1834, fol. 239.

SCHEME *for the Distribution of a Charity given for the better Relief of the aged and needy Poor People of a Parish, to be distributed at Christmas and Easter, as the Vicar, Churchwardens and Vestrymen should think fit.*

1st. That the annual sum of 75*l.* the present rental of the said premises, or the clear yearly rent from time to time, after deducting all incidental expenses, shall immediately the same or any part thereof is received, be carried to an account in the book to be kept as hereinafter mentioned, and entered under the head, and described as belonging and applicable to the charity of [*donor*], which said rent shall be divided and distributed by the vicar and churchwardens of the said parish of ———— in manner hereinafter next mentioned.

2nd. That the said vicar and churchwardens of the said parish shall, on the 25th day of December, and on Easter Monday, in each and every year, or within fourteen days thereof, pay and distribute the said yearly rents to and for the relief of such of the aged and needy poor people of and belonging to the said parish of ————, *London*, as they in their discretion shall think the most deserving, having regard to the said will of the said testator (such poor people so selected not to be in the receipt of parochial relief or assistance) in such sums and proportions as they the said vicar and churchwardens shall think proper.

3rd. That notice of such distribution or application of the said charity monies shall be publicly given in the said parish church of ———— by the parish clerk thereof at least for one Sunday preceding the said days or times.

4th. That an account of the receipts and payments of the monies derived and received from the said charity property by the said vicar and churchwardens, and how and in what manner the same has or have been applied and paid in the preceding year shall be annually printed.

5th. That a book shall be kept in the vestry clerk's office in the church porch of the said parish of ———— wherein shall be entered this scheme or proposal when finally settled by the master and approved by the court, which shall at all times during office hours be accessible to the parishioners of the said parish wishing to see the same (*l*).

(*l*) *Attorney General* v. *Natt*, Rep. dated 15 Nov. 1834. Reg. lib. A. 1834, fol. 98.

SCHEME *for the Application Cy-pres of Funds which had originally been given for the Redemption of Slaves* (*k*).

1st. That the funds shall be transferred and paid by the accountant general of this honourable court to the present trustees, and continue vested in them; but be placed under the management of themselves and three other trustees, of whom one shall be nominated by his majesty's principal secretary of state for the colonial department, and the other two shall in the first instance be approved of by this honourable court.

2nd. That in case any of the six trustees, exclusive of the nominee of the colonial secretary, shall depart this life or go to reside out of the kingdom of *Great Britain*, or desire to be discharged, the surviving or continuing trustees shall elect a successor; and the said J. G. during his life, and after his decease the nominee of the colonial secretary, shall have the casting vote in every such election.

3rd. That so much of the capital and dividends of the said bank annuities as the said trustees shall think fit, shall be applied in purchasing ground in the British colonies, and erecting thereon school-houses for the education of such apprentices as aforesaid (*l*) and their issue; and also normal schools for the purpose of preparing and qualifying teachers for the education of such apprentices and their issue.

4th. That the dividends of the bank annuities not applied for the preceding purpose, and such further portion of the capital of the said bank annuities as the trustees shall think fit, together with the rents and profits of the said estates, be

(*k*) By will dated 1st July, 1670, the moiety of a sum of 2,000*l.* was bequeathed to redeem poor slaves. By a decree of the Court of Chancery, dated 15th Nov. 1831, the master was directed to approve a scheme for the application of a large sum of reduced bank annuities, as well as the dividends thereof, and the rents of certain estates which had been purchased according to the donor's will; and "if the said master should find that the same could not be executed according to the said will, then as near the intent of the said will as it could be, regard being had to existing circumstances and to the present amount of the funds and the rents and profits of the estate."

(*l*) In consequence of the stat. 3 & 4 Will. IV. c. 73, for the abolition of slavery in the British colonies, the trustees proposed to apply the funds towards the education of the apprentices in the British colonies, lately emancipated from slavery under that act, and their issue; and it appeared by a statement of the colonial secretary, that the plans of government for the education of such apprentices and their issue were nearly matured, and that it was proposed by the trustees that the charity funds should be applied for a similar purpose.

applied in and towards paying the salaries of the masters, mistresses, inspectors and superintendants of the said several schools, and in defraying all other expenses thereof; and that the trustees shall be empowered to engage in this country such persons as they may think fit for carrying on the system of education in any of the said several schools.

5th. That the surplus dividends, rents and profits (if any) may be applied by the said trustees in or towards the support of any other schools than such as aforesaid, and generally in promoting education in the British colonies.

6th. That such other persons may be admitted to such schools as aforesaid for the education of such apprentices and their issue as the trustees may consider proper objects of the said charity.

7th. That the trustees shall have power from time to time to make rules and regulations for the management of the several schools under their immediate patronage, and to vary and rescind the same from time to time as they shall think fit.

8th. That the trustees be allowed to retain their costs, charges and expenses out of the income of the said charity.

9th. That an act of parliament (if necessary) be applied for at the expense of the trust fund in order to sanction this application thereof (*m*).

CONVEYANCE *of Lands and Rent Charges by Old Trustees to New Trustees, in pursuance of a Decree of the Court of Chancery.*

THIS INDENTURE made, &c., 1834, between [*three old trustees*] of the one part, and [*fifteen new trustees*] of the other part, [*recital of some old grants*]: AND WHEREAS, by an inquisition taken under a commission of charitable uses, dated the 5th day of September, in the 19th year of the reign of King James the First, it was (amongst other things) found, &c.: AND WHEREAS the commissioners under the said commission, by their decree, bearing date the same day with the inquisition aforesaid, after reciting the said inquisition, and that it appeared that the rents and profits of the lands, &c. [*the decree is recited*]: AND WHEREAS by a decree of the high court of chancery, bearing date the 5th day of March,

Recital of inquisition and decree of commissioners of charitable uses.

Decree of the court of chancery

(*m*) On confirming the master's report, it was ordered that the above scheme should be carried into effect without any application for an act of parliament. *Attorney General* v. *Gibson*, 29 July, 1835, Reg. lib. A. 1834, fol. 869.

1831, made in a cause wherein his majesty's attorney general was informant, and the said [*old trustees*] were defendants, it was declared, that the trustees of the charity in the pleadings mentioned (being the charity mentioned in the said recitals hereinbefore contained) ought not to be persons holding any of the lands belonging to the charity as tenants thereof, and that such charity lands ought to be let at their full value, and the court did order and decree, that it should be referred to the master of the said court in rotation (*n*), to inquire and state to the court of what particulars the property belonging to the said charity then consisted, and how the same was let, and in whose occupation the same then was respectively, and under what circumstances; and it was ordered that the said master should appoint proper persons to be trustees of the said charity property, and that all proper parties should join in and execute a conveyance of the said charity property to the trustees so to be appointed as the said master should direct, such conveyance to be settled by the said master; and it was ordered that the said master should approve of a scheme for the administration of the said charity, and for the letting and management of its property, and for the application of its increased income to the purposes thereof; and in settling such scheme, the master was to have regard to the said decree of the commissioners of charitable uses hereinbefore recited, so far as the directions of such decree should appear to be at present proper or expedient to be retained, and the said master was to state the same with his opinion thereon to the court: AND WHEREAS ——— Esq., the master to whom the said cause stands transferred, made his report in pursuance of the said decree bearing date the 16th day of December, 1833, and thereby certified (amongst other things) that the property belonging to the said charity consisted of the several particulars, and that the same was let, and then was respectively in the occupation of the several persons, and under the several circumstances set forth in the first schedule to his report, and the said master further certified that he had appointed the said [*new trustees*] to be trustees of the said charity property, and that he did approve of the scheme contained in the second schedule to his said report for the administration of the said charity, and for the letting and management of its property, and for the application of its increasing income to the purposes thereof: AND WHEREAS the said master hath set-

directing the appointment of new trustees.

Master's report appointing new trustees.

Master's approval of this deed.

(*n*) Where a decree in a cause in which previous references have been made directs a reference to the *master in rotation*, the decree will be carried to the master to whom the previous references were made. *Attorney General* v. *Shore*, 6 Sim. 460. See 15th, 16th, and 17th orders of 1833.

tled and approved of these presents, and of the lease for a year, upon which the same is grounded, as a proper conveyance of the said charity property to the trustees so appointed by him as aforesaid, and in testimony of his allowance thereof, hath signed his name in the margin of the engrossment of the first skin thereof, and also his name and allowance in the margin of the second skin thereof, and in the margin of the engrossment of the said lease for a year: NOW THIS INDENTURE WITNESSETH, that, in pursuance of, and in obedience to the said in part recited decree of the said court of chancery, bearing date the 5th day of March, 1831, and in consideration of the sum of 10*s.* of lawful money of Great Britain, by the said [*new trustees*] paid to the said [*old trustees*], at or before the execution of these presents, the receipt whereof is hereby acknowledged, they, the said [*old trustees*] have and each and every of them hath granted, bargained, sold, released, and confirmed, and by these presents do, and each and every of them doth, so far as they lawfully can or may, but not further or otherwise grant, bargain, sell, release, and confirm to the said [*new trustees*] (in their actual possession, &c.,) and to their heirs, all those several pieces or parcels of land, cottages, tenements, and hereditaments, particularly set forth and described in the schedule to these presents annexed or under written: and all and singular other the messuages, lands, tenements, and hereditaments (if any) held upon or subject to the trusts of the charity founded by the said [*donor*], or in any manner derived under his gifts, together with all and singular buildings, yards, ways, paths, passages, hedges, ditches, fences, waters, watercourses, rights, easements, profits, privileges, advantages, and appurtenances whatsoever, to the said hereditaments and premises hereinbefore expressed to be hereby granted and released, or any part thereof, belonging or in any wise appertaining, or with the same or any part thereof now or heretofore used, occupied or enjoyed as part or parcel thereof or appurtenant thereto: and the reversion and reversions, remainder and remainders, yearly and other rents, issues and profits, of all and singular the said hereditaments and premises, and every part thereof: and all the estate, right, title, interest, use, trust, property, claim, and demand whatsoever of them the said [*old trustees*], and each and every of them, of, in, to, or out of the same hereditaments and premises and every part thereof: TO HAVE AND TO HOLD the said pieces or parcels of land, cottages, tenements, and all and singular other the hereditaments and premises hereinbefore expressed to be hereby granted and released with their and every of their appurtenances unto the said [*new trustees*] and their heirs, to the use of the said [*new trustees*] their heirs and assigns for ever, upon the

FIRST TESTATUM. Conveyance by old trustees to new trustees.

trusts, and for the intents and purposes hereinafter expressed and declared, or referred to, of and concerning the same (*o*). AND THIS INDENTURE FURTHER WITNESSETH, that in further pursuance of and obedience to the said in part recited decree of the said court of chancery, and in consideration of the sum of 10*s.* of lawful money aforesaid to each of them the said [*old trustees*] in hand paid by the said [*new trustees*] at or before the execution of these presents, the receipt whereof is hereby acknowledged, they the said [*old trustees*] have and each and every of them hath granted, released and confirmed, and by these presents do, and each and every of them doth, so far as they respectively lawfully may or can but not further or otherwise grant, release and confirm unto the said [*new trustees*] and their heirs all those two yearly sums or rents of *l.* and *l.* payable and now paid by ——— and ——— respectively for and in respect of certain lands lying in the town, fields and territories of ——— aforesaid in the said parish of ———, and all other yearly rents and profits (if any) which now are or may hereafter become due and payable to the trustees of the charity founded by or derived from the gifts of the said [*donor*] for or in respect of such lands in ——— aforesaid (*q*), together with all and singular powers and remedies for recovering and compelling payment of the said yearly sums or rents respectively (*r*). And

SECOND TESTATUM. Conveyance of rents by old to new trustees.

(*o*) *The following variations will apply in some cases:* [Upon and for the trusts, intents and purposes declared by the said will of the said testator, according to and in pursuance of the said decree, and such further order or orders as shall be made by the said court in the said cause] [*or*, upon trust for the said free school at R., subject however to the said rules and regulations of the said [*founder*] hereinbefore set forth, and also subject to the powers and provisoes herein after expressed, declared, and contained (*p*),] [*or*, upon and for such trusts, intents and purposes as are expressed, declared, and settled by the scheme attached by way of schedule to the said master's report, dated the —— day of ———].

(*q*) [*Or*, all that the said annuity or yearly rent charge of *l.* given by the said recited will of the said [*testator* and issuing and payable out of the lands and hereditaments hereinbefore mentioned.]

(*r*) [*Or*, all powers and remedies given or provided by the said recited will of the said [*testator*] or otherwise howsoever for recovering and compelling payment of the same annuity or yearly rent charge or any part thereof.]

(*p*) Where the conveyance is not with reference to a scheme providing for the appointment of new trustees, a power for that purpose adapted to the circumstances of the case should be inserted. See *ante*, p. 736.

all the estate, right, title, interest, use, trust, benefit, claim, and demand whatsoever of them the said [*old trustees*] any or either of them of, in, to or out of the said several yearly sums or rents or either of them, TO HAVE AND TO HOLD, receive and take the said two yearly sums or rents of *l.* and *l.* and all other such rents and profits as aforesaid (if any) hereinbefore expressed to be hereby granted, released and confirmed unto the said [*new trustees*] and their heirs, to the use of the said [*new trustees*] their heirs and assigns for ever upon the trusts and for the purposes hereinafter expressed and declared or referred to of and concerning the same. AND it is hereby agreed and declared between and by the said parties hereto, that they the said [*new trustees*,] their heirs and assigns shall and will from time to time, and at all times hereafter stand seized of and interested in all and singular the said pieces or parcels of land, cottages, tenements, hereditaments and premises, and also of and in the said yearly rents or sums hereinbefore expressed to be hereby respectively granted and released with the appurtenances, upon trust for the benefit of the charity founded by or derived from the gifts of the said [*donor*] in such manner and subject to such rules and regulations as are mentioned and set forth in the said in part recited master's report of the 16th day of December, 1833, and the said second schedule thereto, and to such further and other rules and regulations as in and by any other order of the said court of chancery or other court of equity lawfully authorised in that behalf shall or may be from time to time hereafter made, given or established in or relative to the management of the said charity and of the funds for the maintenance thereof, and to, for, or upon no other use, trust, intent or purpose whatsoever. [*Several covenants by the old with the new trustees, that the former had done no act to incumber.*]

Declaration of trust.

THE SCHEDULE *to which the above written Indenture refers.*

FORMS OF BEQUESTS TO DIFFERENT CHARITIES.

I give to the incorporated "National Society for promoting the Education of the Poor in the Principles of the Established Church throughout *England* and *Wales*," the sum of *l.* to be paid exclusively out of such parts of my personal estate as I can lawfully charge with payment of legacies to charitable uses (*s*).

Bequest to the Literary Fund Society.

I give and bequeath the sum of *l.* to the trustees and treasurers for the time being of the Incorporated Society for the management and distribution of the Literary Fund, established in *London* in 1790(*t*), to be applied under the direction of the society, or by its officers and committees to promote the benevolent purposes of the institution; and I direct the said sum of *l.* to be paid exclusively out of such parts of my personal estate as I can lawfully charge with payment of legacies to charitable uses.

Bequest to the Church Building Society(*u*).

And I, *A. B.* do hereby also give and bequeath unto *C. D.* of and *E. F.* of the sum of

(*s*) See *ante*, pp. 229 n, 238. It may often be advisable, at least if such be the testator's intention, to direct the charitable legacies to be paid in preference and priority to the other pecuniary legacies given by the will. Because in case of a deficiency of pure personal estate legacies to charities must abate in proportion with others, (*ante*, p. 238,) and because the assets will not be marshalled in favour of the former class of legacies. *Ante*, pp. 228, 234.

(*t*) The office of this society is in Lincoln's Inn Fields. This society attempts the most useful, the noblest, and the most *delicate* office that can be performed by public *humanity*—that of affording pecuniary assistance to those on whom, of all mankind, poverty presses with the heaviest hand, who, of all sufferers, are the least able to assist themselves—and in whom, shrinking with instinctive dread from the disclosure of wants, it is the most difficult task to lighten the weight of pecuniary obligation. Living in a world and breathing an atmosphere almost of his own, the man of genius cannot but feel occasionally mortified to see ignorance attain the riches, and arrogance rewarded with the honours of the world. To such he cannot appeal; it is then that, trusting to the delicacy of the above society, he seeks, or, as is frequently the case, is sought out by the committee; and if his claim be just, and his character honourable, he finds not only bounty, but sympathy and encouragement. See address of the committee of the society, 1832.

(*u*) This society was incorporated by 9 Geo. IV. c. 42.

to be raised and paid by and out of all my ready money, plate, goods, and other personal chattels and effects, which by law I may or can charge with the payment of the same, upon trust and to the intent that they, or either of them, do pay the same to the treasurer or treasurers for the time being of the Incorporated Society for promoting the Enlargement, Building, and Repairing of Churches and Chapels: which said sum of I desire may be applied towards carrying on the charitable designs of the said society, or such of them as are not contrary to the true intent and meaning of the statute made and passed in the 9th year of the reign of his late majesty King George the Second, intituled, "An act to restrain the disposition of lands, whereby the same become unalienable;" and I direct that the receipt of the said *C. D.* and *E. F.* or the survivor of them, shall be a good discharge to my executors for the same.

Bequest to Incorporated Clergy Orphan Society.

I give to the governors of the Corporation for the Relief of poor Widows and Children of Clergymen, the sum of , to be paid to one of the treasurers out of such part of my personal estate as I can by law charge with the payment thereof (*v*).

I give to the Corporation of the Governors of the Society for clothing, maintaining, and educating poor Orphans of Clergymen of the Established Church in that part of the United Kingdom called *England*, until of age to be put apprentice, the sum of to be paid out of such part of my personal estate as I can by law charge with the payment thereof, and to be applied towards carrying on the charitable purposes for which the said society was incorporated (*w*).

(*v*) This society was incorporated by stat. 49 Geo. III. c. 18, by the title of "The Governors of the Society for clothing, maintaining, and educating poor Orphans of Clergymen of the Established Church, in that part of the United Kingdom of Great Britain, called *England*, until of age to be put apprentice."

(*w*) A special fund was established in the year 1826, called the Clergy Orphan Apprenticing Fund, for the purpose of assisting the children, when they leave the schools, in obtaining suitable apprenticeships. It is placed under the management of the general committee; the treasurers of the society are also the treasurers of this special fund.

ADDENDA.

P. 32, *at end of second paragraph, add*—Evidence of payment of rent to the churchwardens in respect of premises in the parish, and that leases have been made by the churchwardens, in one of which the property is described as parcel of the lands of the parish church, is *primâ facie* evidence that the premises were parish property (*a*).

P. 51, *at end of second line, add*—The stat. 5 & 6 Will. IV. c. 69, contains provisions for facilitating the conveyance of workhouses and other property of parishes and of incorporations or unions of parishes in *England* and *Wales*. This act contains the forms of conveyances to be used under it.

P. 55, *at end of second paragraph, add*—A bill has passed the House of Lords, and is now (April, 1836) in progress through the House of Commons, for enabling the lord or lady of any manor to convey to the incumbent and churchwardens of any parish in which a school for the education of poor children is intended to be erected, or to the trustees of any such school, in any parish or extra-parochial place, so much of the common or waste ground in any such parish or extra-parochial place as may be required for the site of such school, and of a house or houses for the master or mistress of such school, not exceeding in the whole one half of a statute acre, without the concurrence of the parties having a right of common in such waste lands.

Ecclesiastical bodies corporate, or a spiritual corporation

(*a*) *Doe* d. *Higgs and others* v. *Terry and others*, 5 Nev. & Man. 556.

sole, with the consent of the bishop of the diocese, may convey any portion of their lands not exceeding one half of a statute acre, to the Incorporated National Society for promoting the Education of the Poor in the Principles of the Established Church, or to any trustees to be named by the bishop of the diocese for erecting thereon school-rooms for the education of poor children according to the doctrines of the established church, and for erecting houses for the masters or mistresses. It is also provided, that the powers of the act shall extend to school-rooms built on ecclesiastical lands before the passing of the act.

P. 225, *at end of third paragraph, add*—If a testator devise land for purposes altogether illegal, or which altogether fail, the heir takes it as undisposed of: so if he bequeath personalty under the same circumstances, the next of kin are entitled.

If a testator devise land for purposes which are in part illegal, or which partially fail, or which require part only of the land devised, the heir takes the part which fails, or is not required for the purposes of the will; and so conversely, in the case of personal estate the next of kin is entitled.

A testator directed his executors immediately to lay out 30,000*l.* in the purchase of an estate in his name, the income of which he settled on one for life with remainder to others in tail, and on failure of the previous estates, the income was to be applied in the establishment of a charity school for boys in *Exeter*. The money had not been actually laid out in the purchase of lands, but was invested in the public funds, where it remained until the determination of all the previous estates for life and in tail. The gift in favour of the charity being void by the stat. 9 Geo. II. c. 36, on a question between the personal representative and the heir at law of the testator, it was held that the next of kin were entitled to the fund as personalty (*b*).

(*b*) *Cogan* v. *Stephens*, Rolls, Feb. and Nov. 24, 1835; 5 Law Journ. N. S. Chanc. 17. See also *Williams* v. *Williams*, Id. 87.

P. 234, *at end of second paragraph, add*—Prior valid charitable legacies have not a right to resort to the part of the pure personal estate of a residue the gift of which is void. Testator created a general fund of his real and personal estate, out of which he gave several legacies to charities, and the residue to charitable purposes; the former failed as to the realty, and the latter failed altogether for uncertainty. It was held that the former were not entitled to resort to the personalty released in consequence of the invalidity of the latter gift, but that such personalty belonged to the next of kin. It was said by the court, that making the valid legacies to charity good out of so much of the residue as was pure personal estate, would be marshalling the assets, at least as against the next of kin, in favour of the charity legacy, and contrary to the rule as laid down in these cases, which is to appropriate the fund as if no legal objection existed to applying it to the charity legacy, and then holding, as undisposed of, so much of the charity legacy as would in that way be payable out of the prohibited fund (*c*).

P. 266, *at bottom, add*—Sir *C. Pepys*, M. R., in giving judgment, after noticing that many cases had been decided to be within the mortmain act, on the ground that the security was on realty, or created an interest in realty, and that it did not appear upon what ground the decision in *Howse* v. *Chapman* (*d*) was made, nor on what estates the bonds were secured, said, that the case of *Attorney General* v. *Giles* must be decided with reference to the stat. 9 Geo. II. c. 36, s. 3. It had been decided that lands in the colonies are not subject to that act (*f*). There is no doubt that the East India Company have land to a considerable extent; that the corporation, as such, are holders of land; and if it can be made out, that the interest which parliament gives to the holders of the stock, is such as affects the land, that stock must be considered as within the operation of the

(*c*) *Williams* v. *Williams*, 5 Law Journ. N. S. Chancery, 84.

(*d*) *Ante*, p. 160.

(*e*) *Ante*, pp. 263—265.

statute. The statutes which affect the company are 9 & 10 Will. III. c. 44; 6 Ann. c. 92; several intervening acts which are not necessary to be now considered; and then the 53 Geo. III. c. 155, which was in operation at the time this bequest was made. By a reference to the first of these statutes, it appears plainly that the company was originally unconnected with land, and was merely a trading company; and the statute in force when this will was made, directs various modes of keeping the accounts of the profits arising from sales in this country, from which profits the company are to pay to the holders of their stock, interest not exceeding 10½*l. per cent.*; the one party has a right to receive, and the other party has a liability to pay 10½*l. per cent.* out of the profits of the trade. The only land they hold is that which they have for the convenience of the trade, from the profits of which they must pay the dividends. It would be going further than any other case, to hold, that those who are entitled to receive the dividends have an estate in the land held by the company; or that, because the party liable to pay, has land for the purpose of carrying on his trade, the persons who are to receive the dividends out of the profits of that trade, have an interest in the land. Where there is an actual charge on land, or personal estate to be invested in land, in such a manner as in the case of a mortgage, where if default is made in payment of the money, the mortgagee has at once a right to resort to the land, the statute applies; but to apply it to the present case, would be carrying it to an absurd length, and much farther than it was ever intended to be carried, and would involve property to a very considerable amount, which has never been considered as coming within the operation of the statute. Bank stock would come much nearer to the terms of the statute than East India stock, because the holders of bank stock are partners, and as such, are notoriously holders of land. On the whole, therefore, his honour was of opinion that East India stock is not within the act (*g*). It was declared that

(*g*) *Attorney General* v. *Giles*, 5 Law Journ. N. S. Chanc. 44.

the legacy of 3000*l.* East India stock was a good and valid legacy in trust for the benefit of *Christ's Hospital* (*h*).

P. 379, *at end of third paragraph, add*—If gifts are made to a college for their own benefit and that of certain scholars, with a power of visitation as to the latter, the court would not allow the college by their own neglect, or by the abuse of their power, to lessen the number of scholars, or to evade the obligations imposed by the deed of endowment, and voluntarily undertaken by the college, when they received certain estates. For it never can be suffered, that a trustee should protect himself against the charge of violating his trust, by using the powers which in some other capacity he possesses, so as to prevent objects from coming into existence, and claiming the benefit of the fund confided to his care; nor can it be permitted to a party who has taken a benefit coupled with a burden and with an office, to lessen the weight of the burden, by abusing the powers of the office, so as to extinguish or diminish the number of those claimants upon him, who were, in common with himself, the objects of the giver's regard (*i*).

P. 408, *at end of second paragraph, add*—The court has not the power of taking into its consideration, whether an information be beneficial or not to the objects of the charity; but, by its absolute power over costs, the court has the means of checking parties filing useless informations, though such information has been sanctioned by the attorney general. Where a useless and improper information has been filed, the court cannot refuse a decree, but will communicate with the attorney general, that he may have the opportunity of deliberately considering, whether he thinks it desirable for the interests of the public that the proceedings should be carried on (*j*).

(*h*) *S.C.* Reg. lib. A. 1835, fol. 245.

(*i*) *Attorney General* v. *St. John's College*, 1 Coop. Rep. of Lord *Brougham's* Judg. 416, 417.

(*j*) *Attorney General* v. *Merchant Tailors' Company*, 5 Law Journ. N. S. Chanc. 62.

P. 453, *at end of second paragraph, add*—A company in answer to an information seeking an account of monies bequeathed to them for charitable purposes, stated their belief, that they had been deprived of the fund, by forced loans and public exactions, during the political troubles in the 17th century, but that they had since voluntarily continued the payments. It was held, that they were entitled to an inquiry before the master as to these circumstances (*k*).

P. 499, *add as to a note to the 7th section of* 11 *Geo.* IV. *and* 1 *Will.* IV. c. 60—By a bill now before the House of Commons it is proposed to abolish the jurisdiction of the Court of Chancery at *Durham*, and to transfer all suits in that court to the high Court of Chancery.

P. 501, *at bottom, add*—Where the court in any proceeding in a cause, declares a party to be a trustee within the 11 Geo. IV. & 1 Will. IV. c. 60, it may by the same order direct a conveyance to be made (*l*).

P. 532, *at end of second paragraph, add*—A testator whilst at *Lisbon* in *Portugal*, gave by his will, dated May 1825, "to the *British* consul general and treasurer of the *British* Contribution Fund in *Lisbon* 10,500*l.* new four per cent. annuities, transferable at the Bank of England, and directed the dividends to be paid to certain persons therein named during their lives; and as the lives of the annuitants dropped off, the dividends were to devolve to the *British* consul, merchants, and factors, to bestow at their discretion at public meetings, by plurality of votes, to such widows and orphans as might by petition apply for relief, to be granted only *durante bene placito*, that in case of misconduct the allowance to such pensioners might be withdrawn, reserving on the demise of two individuals, two small sums to be bestowed annually on Portuguese or Spanish servants, who had served in the families of *British* subjects upwards

(*k*) *Attorney General* v. *Merchant Tailors' Company*, 5 Law Journ. N. S. Chanc. 62.

(*l*) *Walton* v. *Merry*, 6 Sim. 328. See *Fellowes* v. *Till*, 5 Id. 309; *Prytharch* v. *Havard*, 6 Id. 9.

of ten years, with unimpeached characters; the candidates to apply by petition to the consul, and the distribution to be determined by a plurality of votes at a general meeting.

By 8 Geo. I. c. 17, certain duties thereby imposed were to be paid to a treasurer appointed at a general meeting of the consul general, and *British* merchants and factors residing in *Portugal*, to be applied for certain charitable purposes under the direction of the consul general and *British* merchants and factors. That fund was called "The British Contribution Fund." By the 6 Geo. IV. c. 87, which passed after the testator's will, but before his death, the above act was repealed, and consequently the office of treasurer ceased.

On an information filed at the relation of the consul general at *Lisbon*, for establishing the above bequest, for the transfer of the stock by the executor into the name of the accountant general, and, if necessary, for the settlement of a scheme, Sir *J. Leach*, M. R. said, it is to be inferred that it was the purpose of the testator that his charities should be administered by the same consul, merchants and factors, who at the time when he made his will, administered the British Contribution Fund; but it by no means follows, that because that fund has ceased to exist, his charitable purposes are to fail. The *British* consul, merchants and factors in *Portugal*, are legally competent to administer his legacy for the charitable purposes mentioned in his will; they do not derive their competency from the 8 Geo. I., and would have been fully competent if that statute had never been passed. The repeal of the statute has put an end to the British Contribution Fund, but the charitable bequest given by the testator can in no manner be affected by that circumstance. There is nothing in the will expressive of an intention on the part of the testator that the legacy should fail, if the British Contribution Fund should cease. He meant to place his legacy under the same management as that fund, and this he had a legal right to do, without reference to any act of parliament. It is true, that the testator has named, as trustee, an officer who in his official character no longer

exists, and his intended trust in that respect fails; but the failure of a trustee will be supplied by this court, and it must therefore be referred to the master to approve of a proper person to be a trustee of this charity jointly with the relator (*m*).

P. 536, *at end of second paragraph, add*—A testatrix bequeathed the residue of her property "to charitable purposes which should thereafter be specified, or in default of which, according to the best judgment of the sole executor of her will." She died without specifying any charity to which it was to be applied, and the executor renounced probate. It was held, 1st, that the gift to charity was valid; 2ndly, that the power given to the executor was coupled with his office, and that having renounced, he was not entitled to exercise the power of specifying the charity to which the property was to be applied; and, 3rdly, that the fund was applicable to such purposes as the king, by sign manual, should appoint (*n*).

P. 563, *at end of last paragraph, add*—In the year 1628, money given upon charitable trusts for the benefit of poor persons belonging to the parish of *St. Andrew Undershaft*, with a smaller sum contributed out of the parish chest, was invested in the purchase of lands which were conveyed to certain parishioners described as feoffees of the charity. In the year 1677, the property was sold by the surviving feoffees to a purchaser who had full notice upon the face of the conveyance that the land sold was held by the conveying parties in trust for the poor of the parish. The purchaser devised the lands to the governors of *Christ's Hospital* which had received the rents from the year 1680.

On an information filed on behalf of the above parish for the recovery of the property in question, Sir *J. Leach*, M. R. said, "If, consistently with the facts proved in this case, it were possible to presume a state of circumstances which

(*m*) *Attorney General* v. *Stephens*, 3 Mylne & Keen, 347—352.

(*n*) *Attorney General* v. *Fletcher*, 5 Law Journ. N. S. Chanc. 75.

would render the conveyance to the purchaser a legal transaction, and not a breach of trust, I should, after this great length of time, consider it my duty to raise such presumption; but that not being possible, the governors of *Christ's Hospital* must reconvey the land upon the trusts expressed by the donors of the money with which the land was purchased." As the rents of the estate, to the value of 40*l.* had been annually received by *Christ's Hospital* for many years, and no account of such receipts was sought by the information, the court thought that the defendants had no equity to call upon the parish to refund the money paid on the sale of the estate (*n*).

P. 649, *at end of first paragraph, add*—A testator directed his executors, if the money arising from his personal estate should be sufficient, after payment of his debts, legacies, &c. to contract with the governors of *Christ's Hospital*, for a perpetual presentation of a boy to that charity by the corporation of H. The governors having refused to sell the presentation, it was held that the gift was not within those cases in which the court executes a general charitable purpose *cy-pres*, the particular mode becoming impracticable. Another objection to the bequest was, that it was impossible to ascertain what sum should be applied to the charitable purpose; for the gift of "so much as shall be necessary to effect the contract," could only be ascertained by the performance of the contract; and the court could not act on the statement of the governors as to the sum with which they would have been contented, nor was that the rule prescribed by the testator. It was held in this case, that the testator had created such a difficulty in the administration of his will, as to render his estate liable to the costs of all parties (*o*).

P. 669, *at end of second line, add*—A testator, who in the prior part of his will had given legacies for education, for

(*n*) *Attorney General* v. *Christ's Hospital*, 3 Mylne & Keen, 344, 346.

(*o*) *Cherry* v. *Mott*, 5 Law Journ. N. S. Chanc. 65.

the Baptist's Missionary Society, for the poor generally, for dissenting ministers, and for a village school, gave the residue of his personal estate to trustees, to invest in the public funds, or upon real and government securities in *England;* and directed the trustees to apply the residue of the dividends, interest, and annual produce, after payment of a small weekly sum to an individual, "to and for such benevolent, charitable and religious purposes, as they, in their discretion, shall think most advantageous and beneficial; and for no other use, trust, intent, or purpose whatsoever." As it appeared to be the testator's intention to restrain the discretion of the trustees only within the limits of what was benevolent, or charitable, or religious, and consequently included something more general than charity, it was held that the bequest was void, upon the authority of the cases stated in this section, pp. 662—669 (*p*).

P. 676, *after last paragraph, add*—It has lately been decided, that a court of equity will not compel a corporation to execute a legal assurance of corporate property, in pursurance of a contract not under seal, unless a valuable consideration for the contract be expressly proved, or evidence be given of acts done or omitted by the contracting party, on the faith of the expressed legal assurance; and it is doubtful whether a corporation can borrow money except under seal (*q*).

P. 722, *at end of third paragraph, add*—It was held, that the lessee of land, who with the knowledge and acquiescence of the lessor erected a chapel, did not thereby acquire a right either to the chapel, or the nomination of a minister (*r*).

P. 739, *after second paragraph, add*—A court of equity

(*p*) *Williams* v. *Williams*, and *Williams* v. *Henshaw*, 5 Law Journ. N. S. Chanc. 84, 11 Dec. 1835.

(*q*) *Wilmot and others* v. *Corporation of Coventry*, 1 Younge & Collyer, 518. See *Macher* v. *Foundling Hospital*, 1 Ves. & B. 188; *Winne* v. *Bampton*, 3 Atk. 673.

(*r*) *Attorney General* v. *Lord Foley*, 1 Dick. 363. See 3 Inst. 203; Hobart, 66, 67; 2 Ves. sen. 425.

will not visit slight irregularities committed by trustees of charitable institutions, with severe censures, where they have not acted from corrupt motives (*s*).

P. 769, *before last line, add*—Where the ministers, for the time being, of four parishes, had the nomination of a scholar in *Trinity College, Cambridge*, who was to receive the benefit of a rent charge, exceptions to a decree of commissioners of charitable uses were overruled, which gave the appointment of the scholar, in case of a division amongst the four ministers, to the bishop of *Winchester*, and directed the costs of the proceedings to be paid out of the arrears of the rent charge (*t*).

(*s*) *Attorney General* v. *Joliffe*, 1 Law Journ. Chanc. 43. See Hist. of Churcher's College, Petersfield, Hants, 8vo. 1823.

(*t*) *Steers* v. *Burt*, Finch, Rep. 78.

INDEX.

ABATEMENT,
legacies to charities subject to, in case of deficiency of assets, 238.

ACCEPTANCE,
of estates devised to trustees of charities may be suspended for a reasonable time, 597.
what was held not to amount to, 598.
donee must perform the condition annexed after accepting the estate, 598, 599.
after, the gift cannot be altered, 600.
of a new lease when a surrender of a former one, 680.

ACCOUNTS,
general principle as to directing, in charities, 455.
defendants cannot take advantage of laches, *ib.*
not directed with reference to the statute of limitations, *ib.*
against trustees of charities, on what principle directed, 456.
where instruments creating charity are of difficult construction, *ib.*
on setting aside leases of charity estates, 457.
increased salaries paid to master and usher of school allowed in trustees', 458.
sometimes carried back to the creation of the trust, *ib.*
decreed from the date of accounts in defendants' answer, 460.
decreed against a corporation for 200 years, when, 461.
reference to the attorney general as to balance of, to be accepted, 404.
of arrears of annuity will be decreed, 465.
against colleges less strict than in other cases, when, 466.
of usher's salary decreed against master of school, *ib.*

ACTS OF PARLIAMENT,
title of, not part of, 121 n. (*f*).
what to be attended to, in construction of, 121. *See* STATUTES.

ACTION,
subscriber and member of hospital committee, when liable to, 772.
by secretary of dissolved charitable institution, *ib.*
limitation of, against charity commissioners, 887.

ADDING TO,
construction put on those words in a charitable gift, 191.

ADEMPTION,
in case of a specific gift not founded on intention, 596.
when not occasioned by calling in securities by testator, 597.

AD QUOD DAMNUM,
writ of, when it lay to inquire as to alienation of lands in mortmain, 37.
has long fallen into disuse, 38.

ADVOWSON,
colleges holding more than shall be equal to one moiety of their fellows, restrained from taking, 827.
the above restriction removed so far as relates to colleges in the universities of Oxford and Cambridge, 838.
may be the subject of charitable gift, 716.

AGREEMENT,
to alter a charity will not be enforced, 283, 600.

ALL SOULS' COLLEGE, OXFORD,
appeal to the visitor of, as to admission of founder's kin, 372.

ALMS,
definition of, 802 n. (*x*).
receipt of, a disqualification for voting for members of parliament, 802.
the principle on which the receipt of alms disqualifies, 803.
person retaining his freehold may vote notwithstanding receipt of, *ib.*
receipt of, a disqualification under act for regulating municipal corporations, 807.
medical assistance or education at endowed school, not to be deemed, *ib.*

AMOTION,
power of, incident to the governors of a charity, 352, 371, 772.
does not belong to the Court of Chancery, when, 340.

ANNE'S (QUEEN) BOUNTY. *See* QUEEN ANNE'S BOUNTY.

ANNUITY,
not within the mortmain acts, 9.
may be given to charitable uses by will, 241.
grant out of revenue of the post office held to be, 242.
payable out of duties in respect of seignory of island, held to be personal, 243.

ANSWER,
where it was stated in, that money was lost during civil wars, inquiry as to that fact directed to be made by master, 990.

APPEAL,
will not lie to the House of Lords, when, 850.
from decree of commissioners of charitable uses, 819.

APPOINTMENT,
to charitable uses when defective, aided under stat. 43 Eliz. c. 4, pp. 245, 514—517.

APPORTIONMENT,
a mixed fund of personalty will be apportioned for payment of debts, and charitable and other legacies, 234, 235.
where mortgages and other personal estate were given to charities, the former were ordered to bear proportional part of debts and general legacies, 235.
decree for apportionment of, *ib.* n. (*x*).
not directed for augmenting original objects, where donee of fund was decreed to be entitled to the surplus, 578.
nor for the support of the buildings of a charity beyond their original state, 579.
of charities where the boundaries of a city have been enlarged by charter, 656.
where one parish was divided into two, 657.
where two parishes were united by act of parliament, *ib.*
for equalising benefits between different objects of charity, 658.
how to be made of augmented revenues, *ib.* 545, 548, 615.
when not made, 659.
directed to be made of augmented rents amongst several charities, *ib.*
of charities among separate divisions of parish, may be directed by commissioners for building new churches, 661.
to be registered, *ib.*

APPRENTICES,
act for the due employment of monies given for binding, 819.
how money given for binding poor children to occupations shall be bestowed, *ib.*
how and by whom money given for binding shall be employed, 820.
forfeiture for refusing to employ money given for binding, 821.
party receiving money for, shall be bound with sureties to repay it, *ib.*
within what time money shall be employed, 822.
how money is to be employed where there are not fit persons in the place for which it is given, *ib.*
what sort of persons shall be, *ib.*
account shall be made of money employed for binding, *ib.*
in case of breaches of trust respecting money given for binding, petition may be presented to lord chancellor, &c., who may issue commission, 823.
appeal may be made against order of commissioners, 824.
indentures for binding, exempted from stamp duty, when paid out of *public charity*, 778.
what is deemed a public charity, *ib.*

APPRENTICES *(continued)*.
assignment of, when not exempt from duty, 779.

ARREARS,
of rent and interest, for what time recoverable under stat. 3 & 4 Will. IV. c. 27, s. 42, p. 455 n. (*w*).
of charity fund will be decreed, although there were no objects of the charity, 465.
purchaser of land relieved from arrears of rent charge, when, 299.

ASSETS,
general principle of equity as to marshalling, 227.
marshalling of, extends to legatees, 228.
never marshalled where *residue* of personalty was given to charities, *ib.* 229.
distinction in marshalling, formerly made between gift of a residue and a particular legacy, 230, 231.
where mortgages were enumerated, 232.
court would not marshal, where leasehold was specifically bequeathed, 233.
nor where leaseholds for lives were bequeathed, 234.
doctrine of marshalling, in favour of charities appears now to be wholly exploded, *ib.* *See* APPORTIONMENT.

ASSURANCES,
act for remedying defects in, to charitable uses, 858.

ATTORNEY GENERAL,
right of, to file information respecting charities, 399.
power of, devolves on solicitor general, when, *ib.*
not a necessary party for establishing a modus, 400.
must be heard where there is a question as to fund given for superstitious uses, *ib.*
consent of, required in proceedings by information, *ib.*
attendance of, before master on settlement of a scheme, 401.
prayer of process against, 402.
fiat of, must be obtained to informations, 402.
requires certificate of barrister before granting *fiat*, 403.
practice of, on signing information, *ib.*
consideration of informations submitted to, 404.
may consent to compromise of a charity suit, 405.
reference to, with consent of court may be made in charity cause, 407.
a necessary party to informations respecting charities, 411.
when not a necessary party, 412.
directions for management of charity given without concurrence of, 414.
when decree may be made without interference of, 416—418.
when a necessary party to informations respecting public funds, 420.
informations in name of, may be filed as to funds given for public purposes, 421.
may proceed without a relator, 428.

ATTORNEY GENERAL (*continued*).
authorised to commence proceedings for remedying abuses in charities, 429.
never pays, but always receives costs, 474.
when not allowed separate costs of his solicitor, *ib.* 475.
See RELATOR.
AUGMENTATION OF SMALL LIVINGS.
impropriator may give tithes for, 51.
lands and chattels may be given by deed enrolled, or will, to the governors of Queen Anne's Bounty, *ib.*
gifts for the, are charitable uses, 73.
explanation of the term portion of tithes in act for, 862.
the stat. 29 Car. II. c. 8, to extend to, by colleges and hospitals, *ib.*
by spiritual persons, colleges and hospitals, and of any hereditaments, to any church or chapel being in their patronage, 863.
to be made in the form of annual rents, *ib.*
where hereditaments are in lease, a part of the reserved rent may be granted as, *ib.*
may be made to take effect on determination of lease where hereditaments are subject to a lease not reserving a rack rent, 864.
power in such cases to defer the commencement of the augmentation upon a renewal of the lease, 865.
power to apportion augmentations in future leases, *ib.*
restriction on the exercise of the power of apportionment, *ib.*
repeal of so much of 29 Car. II. c. 8, as requires an express continuance of the augmentation in new leases, *ib.*
ecclesiastical corporations, colleges, &c. holding impropriate rectories or tithes, may annex the same to any church or chapel within the parish in which the rectory lies or the tithes arise, 866.
power to annex lands, &c. held by them to any church or chapel under their patronage, *ib.*
such annexations to be subject to prior leases, and the rents reserved upon the same or some portion thereof, to be determined by the deed of annexation, *ib.*
provisions of 39 & 40 Geo. III. c. 41, to extend to such annexations in certain cases, 867.
certain powers to apply to persons entitled to alternate presentations, *ib.*
benefices exceeding in yearly value 300*l.* not to be raised, and all others to be limited, 868.
power to determine the yearly value of any hereditaments for the purposes of the act, *ib.*
by whom the above-mentioned powers may be exercised, and with whose consent, *ib.*
incumbents not to exercise them, *ib.*
incumbent may annex tithes, &c. to which he is entitled, arising out of the limits of his benefice to the church or chapel of the parish where they arise, 869.
power for rectors or vicars to charge their rectories and vicarages for the benefit of chapels of ease, &c. *ib.*

AUGMENTATION OF SMALL LIVINGS (*continued*).
exception to the preceding power, 870.
how consent to the exercise of powers in the act shall be testified.
where patronage of benefice is in the crown, *ib.*
where patron is incapacitated, 871.
where patronage is part of the possessions of the duchy of Cornwall, 871.
instruments to be deposited in the registry of the diocese, *ib.*
office copies of to be evidence, 872.
fee to the registrar, *ib.*
meaning of the word benefice, *ib.*
act to extend to all heads of colleges under whatever denomination, *ib.*
to England and Wales, *ib.*

AWARD,
respecting charity will not be acted on without attorney general's consent, or a reference to the master, 407.
renewal of lease decreed according to terms of, 408, 683.

B.

BANK OF ENGLAND,
incorporated with power to purchase and alien lands, 55.

BARRISTER,
mandamus does not lie to compel admission to the degree of, 392.

BATH INFIRMARY,
bequest to, when held to be void, 256.
enabled to acquire an interest in lands, *ib.*

BEDFORD CHARITY,
Jews not objects of Bedford grammar-school, 107.
private act for the regulation of, 509.
construction of, as to removal of master, 510.
as to jurisdiction by petition, *ib.*

BEDFORD LEVEL,
corporation of, enabled to hold lands, 55.

BENEVOLENCE,
bequest for objects of, void for uncertainty, 85, 666, 667, 994.

BEQUESTS TO CHARITIES,
(1.) *Which are void,*
of leaseholds, 154.
money due on mortgages, *ib.*
secured by poor and county rates, 158.
navigation shares, 160.
securities on parish rates, *ib.*

BEQUESTS TO CHARITIES (*continued*).
of money to be laid out on real security, 160.
to exonerate lands in mortmain, 161.
charged on real estate, 163.
vendor's lien for unpaid purchase money, *ib.*
of money due on judgment, 164.
money to arise by sale of real estate, *ib.*
legacies to be paid out of purchase of real estate, 165.
produce of real estate for charities abroad, 166.
money to be invested in the purchase of lands, 168—172.
money to be laid out in *erecting* buildings for charities, 173—175.
in *building*, 175.
of money for hiring land for charities, 179.
a direction to build implies that an interest in land is to be acquired, unless land in mortmain be pointed at, 192.
when connected with and dependent upon a devise of real estate, 195.
when principal gift has failed by death of grantor, 198.
where money is to be employed in buildings to be erected contrary to the stat. 9 Geo. II. c. 36, p. 199.
where the legal and illegal objects cannot be distinguished, 200—202.

(2.) *Which are valid,*
of money not to be laid out in real estate, 121.
where trustees have a discretionary power to invest in a personal fund or in lands, 183—187.
when the testator directs that the money shall *not* be laid out in real estate, 187, 188.
of money for meliorating lands already in mortmain, 189—192.
where gifts for legal and illegal purposes can be distinguished, 203, 204.
of personal annuities, 241.

BERKHAMPSTEAD GRAMMAR-SCHOOL,
observations on, in the report of the committee of the House of Commons on charities, 320, 321.

BLANK,
parol evidence not admitted to explain, in will, 527.
in names of charities supplied by court, 528, 651.

BOARDERS,
admission of, into grammar-schools, upon what principles to be allowed, 645, 646.

BOLTON SCHOOL,
construction of private act of parliament respecting, as to removal of trustees, 341.

BOND,
act for rendering valid, for resignation of living, does not extend to trustees of charities, 716.
whether resignation bond given by a schoolmaster of ancient school be valid, *quære*, 732.

BOSWORTH (MARKET) GRAMMAR-SCHOOL,
the teaching of English, writing, and arithmetic directed to be introduced into, 637.

BOTANICAL GARDEN,
devise for, when a charitable use, 76.

BRAZEN NOSE COLLEGE,
case as to the right of, to the whole surplus rents of estates, 587—593.

BRITISH MUSEUM,
trustees of, enabled to hold lands to a limited extent, 56.
to purchase and take lands and interests in them, 57, 241.
statutes relating to, 56, n. (*l*).
is in the nature of a charitable institution, 70.
bequest of produce of land to, formerly void, 241.

BUILDING,
bequests for, when void, 174—178.
valid upon lands already in mortmain, 189, 190.

BYE-LAW,
may be made by corporation, 350.
how to be made under municipal corporation act, 726, n. (*e*).
existence of ancient, may be presumed for altering right of election, 351.

C.

CANAL SHARES,
bequests of, for charitable uses, void, 160.
declared to be personal estate by several private acts of parliament, *ib.*

CATHOLICS. *See* ROMAN CATHOLICS.

CHANTRIES,
of what they consisted, 20.
given to the king by stat. 1 Edw. VI. c. 14, pp. 21, 93, n.
large sum produced by sale of, 95, n. (*m*)

CHAPLAIN,
election of, 721—725. *See* CURATE, ELECTION.

CHARGES,
on real estates in favour of charities, void, 119, 163.

CHARITABLE USES.
general observations on term charity, 58, 59.
what are enumerated in stat. 43 Eliz. c. 4, p. 60.
the subjects of, *ib.*
the general objects of charitable gifts, 61.
gifts to the poor, *ib.*

CHARITABLE USES (*continued*).
enumeration of several gifts which have been construed to be, 62, 63.
gifts to poor relations, when construed to be, 63—65.
for the advancement of learning, 68.
for the benefit of colleges, 69.
to support a school for gentlemen's sons, 70.
for the benefit of the British Museum, *ib.*
for the advancement of religion, 71.
for the repair of chapels, *ib.*
to support preachers, *ib.*
for increase of Christian knowledge, 73.
to support a perpetual curate, *ib.*
to augment small livings, *ib.*
for pious uses, *ib.* 74.
to support religious establishments within the toleration act, *ib.*
places of worship for Roman Catholics, 75.
for general and public purposes, *ib.*
enumeration of public purposes considered to be, 75, 76.
general principle as to what constitutes, 76.
whether tolls granted by the crown to be expended on murage and pavage of a town be, *quære*, 77.
grant of privileges for bettering a town, 78.
of lands to a corporation for public purposes, *ib.*
to repair ports and havens, 79.
parliamentary grant of duty on coals imported into a town to protect the inhabitants, *ib.*
to supply inhabitants of a town with water, 81.
to relieve from taxes, *ib.*
for redemption of national debt, 82
conveyance of lands for, must be by deed enrolled in chancery six months before death of grantor, 118.
all conveyances of lands, &c. not according to the stat. 9 Geo. II. c. 36, to be void, 119.
conveyances to, must take effect in possession, 124.
act for remedying defects in assurances to, 858.

What are not deemed,
gifts to objects of benevolence and liberality, 82, 83.
for *private* charity, 85.
charitable and public uses, *ib.*
gift for erecting a monument to the testator's memory, 87.
for building vault for grantor, 88.

CHARITY,
definition of, according to parliamentary law, 803.
cases where partakers of, were held not to be disqualified for voting, 804, 805.
where receipt of, was a disqualification, 806.

CHRISTIAN RELIGION,
part of the law of the land, 106.

CHURCHES,
owners of lands, &c. may by deed enrolled or by will give five acres of land or 500*l.* for building new, 53, 833.
gifts exceeding the limit may be reduced by lord chancellor, 53, 834.
king may grant lands for like purposes, 54, 840.
lord of a manor may grant five acres of the waste for any church or chapel, 54, 841.
commissioners for building may accept lands for building churches, 54.
may take lands for use of persons serving church or chapel, *ib.*
commissioners of woods and forests may grant sites for churches, &c. *ib.*
to vest in persons specified in sentence of consecration, 55.
exempted from church and poor rates, 784.

CHURCHES AND CHAPELS,
conveyances of lands for, to be void, 814.
collateral assurances for evading the act prohibiting conveyances, to be void, *ib.*
form of bequest to Incorporated Society for Promoting the Enlargement and Building of, 983.

CHURCHWARDENS,
not a corporation for taking lands, 28.
except by custom or statute in particular places, 29.
held entitled to a legacy given to an impropriate parish church, 71.

CHURCHWARDENS AND OVERSEERS,
enabled to purchase workhouses, 29.
to alter and enlarge workhouses, 30.
to hire land for employment of poor, *ib.*
property of a parish vested in, as a corporation, 30.
property vested in trustees for benefit of a parish vests in, 31.
parish property will not vest in either class singly, 32.
what sufficient demise in ejectment by, *ib.*
what is evidence that property belongs to parish, 985.
and resident ministers empowered to receive rent charges not exceeding 20*l.* *per annum* belonging to charities where there are no existing trustees, 874.
the like power extended to rent charges not exceeding 50*l.* *per annum*, 887.

CLERGY,
formerly divided into regular and secular, 6, n. (*s*).
secular within the stat. *de religiosis*, 7.
form of bequest to society for educating orphans of, 984.

COLLEGE,
may stipulate for some advantages on accepting a bye foundation, 599.
cannot alter the nature of the charity, 600.
arrangement with, not undone after a long lapse of time, *ib.*
agreement by, to grant lease, when not binding, 685.

COLLEGE (*continued*).
head of, with consent of majority, may make elections, 718.
statute to prevent corrupt elections in, *ib.*
president of, when a necessary party to an election in, *ib.*
when concurrent voice of master is and is not necessary in election of fellows, 719.
qualification as to property in statutes of, 720.
fellow of, when bound to refund salary, *ib.*
excepted from statute of charitable uses, 817.

COMMISSION,
to inquire whether lands had been aliened in mortmain, 10 n. (*c*).
will be granted for ascertaining lands belonging to charity, 415.
may be issued by lord chancellor, &c. to inquire as to misemployment of money for binding apprentices, 823.

COMMISSION OF CHARITABLE USES,
issued to inquire whether there had been any abuse or misapplication of charitable funds, 276.
an ancillary jurisdiction, 277.
proceedings under, subject to appeal to lord chancellor, *ib.* 819.
has long fallen into disuse, 278.
numbers of, which were issued, *ib.*
commissioners, by whom named, 279.
into what county to be awarded, 280.
who may be commissioners, *ib.*
what persons were disqualified to be, 281.

Of the Inquisition,
on taking parties to be summoned, *ib.*
inquiries, by what means to be made, 282.
requisites of the inquisition, *ib.*
where to be taken, *ib.*

Of the Decree,
by whom to be made, 283.
what things to be observed in, *ib.*
the employment must be directed, *ib.*
the objects of charity could not be changed, 284.
to be certified by the commissioners, 818.
execution of, to be directed by lord chancellor, 819.
might be made against corporation, 285.
damages for detention of money, *ib.*
all persons were bound by, except those claiming paramount the gift, *ib.* 286.
costs could be decreed by commissioners, *semble*, 287.
allowance to objects might be increased, *ib.*
could not enable persons to take lands as a corporation, 288.
nor interfere with charities having visitors, *ib.*
commissioners could make bye laws, *ib.*
commission and decree returned to petty bag office, 289
exceptions to decree might be taken, by whom, *ib.*
chancellor could annul decree, *ib.*
or alter decree, 290.
appeal to chancellor came before him personally, 291.

COMMISSION OF CHARITABLE USES (*continued*).

Exemptions from,

the two universities, cities, corporate towns, and charities having visitors, 292, 872.
hospitals in reputation, 294.
companies in London, *ib.*
purchasers for valuable consideration, 296—299, 818.

COMMISSIONERS OF CHARITIES,

king enabled, by stat. 58 Geo. III., c. 91, to issue a commission to eight, 305.
to investigate charities for education of poor in England and Wales, *ib.*
to report proceedings half yearly, *ib.*
universities and certain public schools exempted from the inquiry, 306.
powers of, did not extend to charities having visitors, *ib.*
nor to those supported by voluntary contributions, 307,
two reports were made by, *ib.*
number of, increased to twenty by stat. 59 Geo. III. c. 81, p. 307.
powers of, extended to all charities in England and Wales, except the universities, &c., 307.
authorised by stat. 59 Geo. III. c. 91, to certify to attorney general cases requiring legal interference, 308.
cases certified by, *ib.*
powers of, continued until 1st July, 1830, p. 309.
twenty-two reports made by, *ib.*
digests of reports of, *ib.*
contents of, *ib.*
powers of, continued until 15th August, 1834, p. 309.
objects of inquiry by, extended, 310.
six additional reports made by, *ib.*
ascertained the number of charities to be investigated, 311.
to what objects attention was directed by, *ib.*
inquiry by, not systematically pursued, *ib.*
counties not investigated by, 312.
salary awarded to, *ib.*
costs of inquiries by, 313.
general results not stated by, *ib.*
good consequences likely to follow from inquiries by, *ib.*
by stat. 5 & 6 Will. IV. c. 71, the king enabled to appoint, 314, 879.
to examine the amount and application of all charitable funds, 315, 880.
may report special circumstances, *ib.*
sittings of, where to be held, 315, 881.
universities and certain public schools exempted from powers of, 316, 885.
may appoint trustees of charities, when, 316, 887.
may certify particulars of charities, where there have been breaches of trust, &c. 428.

COMMISSIONERS OF CHARITIES (*continued*).
certificate of attorney general to be evidence that case has been certified, 430, 874, 886.
number of, to receive salaries, 880.
to take oath before entering upon their duties, *ib.*
form of, 881.
vacancies of, may be supplied by crown, *ib.*
may appoint secretary and other officers, *ib.*
send for persons and papers, *ib.*
no person to be obliged to travel more than ten miles, 882.
may examine upon oath, *ib.*
to transmit examinations and papers to office at Westminster, *ib.*
persons swearing falsely before, incur penalties of perjury, *ib.*
refusing to appear before, or to produce deeds, &c., liable to be fined, 883.
purchasers without notice not bound to answer interrogatories of, *ib.*
mortgagees and trustees not compellable to disclose titles without notice, 884.
persons not compellable to criminate themselves, *ib.*
letters to and from, to be free of postage, when, *ib.*
penalty for sending letters not relating solely to execution of act, 885.
officers having custody of records to furnish copies if required by, *ib.*
stamp duty not required on, *ib.*
powers of, not to extend to charities supported by voluntary contributions, 886.
except as to management and application of rents for twenty years, *ib.*
chief commissioner to superintend proceedings instituted by attorney general, *ib.*
limitations of actions against, 887.
may direct attorney general to file informations previously to reports of, being presented, 888.

COMPANY,
allegation in information against a, 924, n. (*k*).
form of information against, for due administration of several charities, 932.

CONFIRMATION,
of void devises by heir-at-law, must be according to the provisions of the stat. 9 Geo. II. c. 36, p. 227.

CONSIDERATION, VALUABLE,
what is considered, 298.
purchases for, confirmed, when, 119, 859.

CONSTRUCTION,
charitable gifts favourably construed in the civil law, 513.
rules of, adopted in English law from the civil, 514.
of defective assurances in favour of charity, *ib.*—517; 245—247.
of words creating a perpetuity, 517.
where neither trustees nor objects are named, but there is a reference to a future appointment not made, 518.

CONSTRUCTION (*continued*).

of charitable gifts, differs from other cases, 518
where no trustees are named, but there is a reference to a class of objects without naming any individuals, 523.
of bequests to trustees for such charitable purposes as they in their discretion shall appoint, where objects are or are not named, 524.

(1) *In cases of failure of Trustees and of Persons to select Objects arising ex post facto,*

gift does not fail by trustee's death in testator's lifetime, 530.
nor by the testator's erasing the name of the executor, 531.
nor by the death of the person to whom *power* only of distribution is given, 532.
nor by the trustees declining to exercise a discretionary power of distribution, 536.

(2) *Where the whole Rents are devoted to Charity,*

rule as to, depends on intention, 539.
no resulting trust in favour of heir-at-law against charity, *ib.*
mode of ascertaining the intention, 541.
where the trusts declared do not exhaust the whole rents, 542.
where the devise is to a future establishment, *ib.*
devise of rents passes the lands, *ib.*
intention to be collected from context of will, 543.
the rule as to when whole rents are applicable to charity stated, *ib.*
early cases on, referred to, 544.
a gift of the whole fund, in certain proportions, amongst the objects, *ib.*
case of *Thetford* school, 545.
Lord Brougham's illustration of, 547.
increased value, distributed in proportions, 548.
gift of the *whole profits* at the time of the gift, passes whole fund to charity, 548.
effect of declaration that whole rents should go to charity, 549.
case of *Skinners' Company*, where whole rents were held applicable to charity, 551—556.
a small surplus unappropriated, not sufficient to deprive charity of increased value, 557.
special directions for application of part of rents, with power for founder to let lands at rents amounting to the sum disposed of, does not give right to heir-at-law on expiration of lease, 559.
case where whole rents were decreed to charity and lease set aside, 561.

(3) *Usage admitted in construing Charitable Gifts,*

old charters and deeds construed with reference to, 562.
evidence of the manner of enjoyment admitted, 563.
in the construction of private deeds, 564.
of instruments with respect to the nature of schools, 566.
to places for religious worship, 567.
inference from mode of distribution adopted by founder and long acquiescence, *ib.*

CONSTRUCTION (*continued*).

(4) *Where the Donee of the Fund is entitled to the Surplus Rents, subject to Fixed Payments,*

the case of *Bristol* corporation (*Sir Thomas White's* Charity), 567—570.
the donee of the fund entitled to surplus although the rents had increased beyond the donor's expectation, and were directed not to be raised, 571—575.
surplus decreed to a company of the fund where the donee ordered it, after certain specified payments, to be disposed of according to their wills and pleasures, 575—578.
case where company was held entitled to surplus, the whole rents not having been originally distributed, 579—582.
another case where company was held bound to distribute only the original sum given, 582—584.
where gift to a company was held not to be a charity, *ib.*
where fund was given to a body corporate, subject to payments to certain members thereof, *ib.* 585.
where fund was not given out and out, but to be applied as trustees should think fit, 587—594.
the case as to scholars from *Pocklington* school, 594—596.

CONTRIBUTION,

of mixed fund of personalty for payment of debts, and charitable and other legacies, 234. *See* APPORTIONMENT.

COPYHOLDS,

are within the stat. 9 Geo. II. c. 36, p. 123.
conveyance of, to charitable uses must be by deed enrolled, *ib.*
mode of calculating fines on admission of trustees of charities to, 741.

CONVERSION,

in cases of, where purpose fails, the produce continues realty, 214.
ulterior intention of, not inferred, *ib.*
general result of the authorities upon, 215.
void legacy to charity held to pass to residuary legatee in case of complete conversion of realty, 216.
in cases of, a question of intention how far primary charges on personalty are to be paid out of produce of realty, 217.

CORPORATIONS,

may take, but not retain without license in mortmain, 8.
what alienations to, are within the mortmain acts, *ib.* 9.
purchases by, declared to be within the mortmain acts, 17.
definition of, 22.

Different kinds of,

aggregate and sole, *ib.*
sole, what, *ib.*
ecclesiastical and lay, *ib.*
ecclesiastical, what, *ib.* 23.

CORPORATIONS (*continued*).
eleemosynary and civil, 23.
eleemosynary, what, *ib.*
civil established for variety of purposes, 25.
how created, 26, 27.
right to purchase lands incident to, 27.
to any extent with license in mortmain, *ib.*
what words create a fee in conveyances to, 28.
for particular purposes only, *ib.* *See* CHURCHWARDENS AND OVERSEERS.
made trustees of charities, 34.
may purchase fee-farm rents, 55.
cannot take lands by devise, 244.
may have benefit of a devise, when, *ib.*
could take under a devise to charitable uses, 246.
charters, &c. of, inconsistent with provisions of municipal corporation act, repealed, 323.
accounts, for what time decreed against, 458—460.
must make good charity property out of their general funds, 465.
reference to the master to inquire as to the property of, *ib.*
liable to payment of costs, when, 471.
power of aliening estates incident to civil, 672.
Court of Chancery will not generally take cognizance of alienation of estates by, 673.
decree against, for renewal of a lease, 674.
the right to use a common seal incident to, 675.
can only bind their property by deed under common seal, *ib.*
can neither take nor grant property except by name of incorporation, 516, n. (*u*), 676.
corporation resolution, how far binding on, 676, 994.

Municipal,
observations of corporation commissioners with regard to property held by municipal corporations, *ib.* n. (*d*).
what name is to be taken by, 676.
powers of alienation by, restrained, 672.
charitable trustees of, to retain property until 1st August, 1836, pp. 507, 508.
vacancies among, how to be supplied, *ib.*
how long trust is to be retained by new trustee, *ib.*
lord chancellor, prior to 1st August, 1836, to regulate administration of charitable trusts in, *ib.*
council of, to act as trustees where corporations were *ex officio* sole trustees, 677.
to appoint trustees, when, *ib.*
powers vested in trustees to be transferred to councillors, when, *ib.*
property of, how to be applied, *ib.*
power of sale and leasing by, restrained, 678.
consent of lords of the treasury to alienation by, how to be obtained, *ib.*
council of, may renew leases, 679.
collusive alienations and purchases of property by, may be set aside, 679.

CORPORATIONS (MUNICIPAL), (*continued*).
advowsons vested in, may be sold by ecclesiastical commissioners, 679.
in many instances are trustees for charities, 738.
when receipt of alms is a disqualification under act for regulating, 807.
when not, *ib.*
when, to whom, and how pensions and allowances are to be secured under act for regulating, 807, n. (*s*).

COSTS,
under commissions of charitable uses, 287.
of petitions to lord chancellor as visitor in right of the crown, may be awarded, 342.
not within 2 Geo. II. c. 23, s. 23, *ib.*
trustee being the solicitor, entitled only to costs out of pocket, 467.
trustees generally entitled to, 467, 468.
should apply for, at hearing of cause, 468.
when they will be charged with, *ib.* 469.
of obtaining a private act of parliament will be allowed, 470.
but not an unsuccessful application for, without sanction of the court, *ib.*
of visitors of a school will be allowed, *ib.*
when to be paid by trustees and corporations, 471, 472.
of town clerk, by whom to be paid, *quære*, 473.
how to be taxed, *ib.*
when to be paid, as between solicitor and client, 474, 475.
not paid, but *received* by the attorney general, 475.
of distinct solicitor for attorney general, when disallowed, *ib.*
relators entitled to, when, *ib.*
allowed to relator who had prayed wrong relief, 476.
relators sometimes decreed to pay, *ib.* 477.
on setting aside leases of charity estates, 478.
not decreed against a purchaser, when, *ib.* 479.
to be paid out of testator's general assets, when, *ib.*
may be apportioned between different funds, *ib.* 480.
on reversing decree of lord chancellor of Ireland, 481.
under general inclosure act, *ib.*
of appointing new trustees may be ordered to be paid out of trust funds, 505.
cannot be given in proceedings under summary powers of act of parliament, when, 510.

COUNTY-RATES,
bequest of money secured on, to charities, void, 158.

CROWN,
protection of several interests vested in, 267.
has superintendence of charities, *ib.*
unless regulated by charter, 268.
upon what ground the right of, to interfere with charities is founded, 269.

CROWN (*continued*).
right of, to dispose by sign manual, of property given to charity, 269.
where money is given to charity indefinitely, without trustees or objects, 270.
where no charity was named, *ib.*
in case of indefinite gift to the poor, 271, 272.
of death of person to dispose of fund, *ib.*
of gift to charitable and pious uses generally, 272.
where executor had renounced probate, 992.
right of, to appoint does not arise until failure of charitable purpose, 273.
lands given to superstitious uses vested in, when, 93.
when forfeited to the, 95, 96.
when not, 97, 98.
power of, to appoint to other uses where gift is to superstitious uses, 99, 100, 273.
enabled to grant charters of incorporation, with advice of privy council, 323.
to be represented by solicitor general where private right of, is concerned, 399.
may vest lands in any person for building or repairing any church or chapel, or any house for the residence of a minister, 54, 840.
no one grant for the above purpose to exceed five acres, *ib.*

CURATE,
the right to elect a perpetual, in whom vested, 724.
nomination of, may be by parol, *ib.*
how the right of nomination to, may be established, 725.

CY-PRES, (DOCTRINE OF),
the rule to execute donor's intention as nearly as possible, 601.
not carried so far as formerly, *ib.*

(1) *Where the particular objects named have failed or cannot take.*
applied where charity is the substance of the gift, and the particular object fails, 602.
applicable, although the trustees are forbidden to diminish the fund, or to apply the interest to any other purpose, 603—606.
in favour of general intention of testator, 606,
where the testator had a double object, part of which failed, 607.
will not be directed until it has been ascertained whether there will be a surplus after answering the original purposes of gift, 608.
a legacy void as to some purposes, applied, 609.
a legacy given to a charitable society which had been dissolved, applied, 610.
will be applied in favour of every class of persons within the act of toleration, *ib.*, 613.

(2) *Where the Fund is more than sufficient for the objects specified,*
the objects of the charity may be increased, 613.
the distribution of the fund may be altered, 614.

CY-PRES (DOCTRINE OF), (*continued*).
all the objects to be augmented proportionally, 615.
benefit of the charity extended to objects not expressly named, *ib.*
the residue of an estate directed to be applied, 620.
where the property given for the performance of public duties was more than a reasonable compensation, 621—625.
application of surplus fund given for the repairs of the church, *ib.*
property given in aid and relief of poor citizens and inhabitants, to be applied to such as do not receive parochial relief, 626—628.
Lord Eldon expressed an opinion that those receiving parochial relief were not to be excluded, 627.
funds given for relief of the poor may be applied for the purposes of a school, 628, 629.
exception to the rule that money given for the relief of the poor is not to be applied in aid of the poor rates, 629.
(3) *Of the application of the doctrine of Cy-pres to the regulation of Grammar-schools,*
application to objects different from those expressed, not allowed without necessity, 630.
trustees cannot of their own authority apply property, *ib.*
the nature of grammar-schools not altered by the court, 631—635.
application of part of the funds to purposes of teaching writing and arithmetic, has been sanctioned by the court, 635—638.
when part of charity fund may be applied in buildings of school, 639.
application to general advantage of school without benefiting boys on foundation, sometimes allowed, 639—645.
(4). *When the doctrine of Cy-pres will not be applied,*
where testator had one specific object which cannot take effect, 648, 993.
where the particular objects intended may come into existence, 649.
where there is merely a general intention to die testate as to the *whole fund*, 650.
where the gift is void on account of being connected with an intention to acquire an interest in land, *ib.*
application of, where there had been deviation from founder's intention, 645.

D.

DECREE,
application to suspend proceedings under, disallowed, when, 454.
pro confesso, when made on information, 452.
against attorney general for not answering, 453.
DEEDS,
an order for production of, may be obtained, when, 453.
form of order for, 453 n. (*q*).

DEEDS (continued).
what are to be produced to be determined by the master, 454.
production of, will be ordered in suit for setting aside leases of charity estates, 709.
what, a party is bound to produce, *ib.*
what acts of corporation must be done by deed, 675, 676.
delivery of, by corporation, not necessary, 675.

DEVISE,
to corporations not allowed by stat. of wills, 246.
of a trust for a corporation may be good, *ib.*
to charitable uses construed favourably, 245.
to a corporation for charitable uses, valid within 43 Eliz. c. 4, p. 246.
by tenant in tail to charity, valid, *ib.*
to colleges is good, 247.
to universities and colleges therein, and to colleges of *Eton*, *Winchester*, or *Westminster*, valid, 248.
to college in trust for other objects, void, 250.
by head of a college, when void, 251.
for purposes inconsistent with statutes of the college, void, *ib.*
to such charitable uses as third party shall appoint, 253.

DEVISEES,
will be entitled to a void charge where it is an exception to the devise, 210.
of copyholds held to be entitled to void condition for charity where the testator had no heir, 213.
specific preferred to the residuary in a particular case of a rent charge, 212.
of general residue held entitled to void legacies out of produce of realty, 213. *See* LEASEHOLDS.

DISPENSATION,
with statutes of college, may be presumed from usage, 347.

DISSENTERS (PROTESTANT),
history of the statutes affecting, 100.
relieved from penalties by toleration act, 102.
trusts for benefit of, valid since that act, 103.
Court of Chancery will execute trusts for, 104, 744.
gift for the benefit of, generally, not void, 104, 105.
trustees of establishment for, must adhere to the original doctrines, 742.
of the election and removal of ministers of, 762.
in whom the right of electing ministers of, is vested, *ib.*
injunction to restrain minister of, from officiating in chapel, when refused, *ib.*
ministers of, when only tenants at will to the trustees, 763.
reference to the master to inquire as to dismissal of minister of, 765.
when courts of equity will not interfere with respect to dismissal of minister of, *ib.*

DISSENTERS (PROTESTANT), (*continued*).
district committee of Wesleyan Methodists may suspend a minister, 766 n. (i).
trustees of establishment for, must be appointed by Court of Chancery, when, 766.
how to be discharged, 767.
when an inquiry as to the religion of the society must be made, *ib.*
ministers of, generally disqualified to vote for members of parliament in right of their office, 800.
allowed to vote when appointed for life, 802.

DOLES AT A FUNERAL,
no abatement as to, 238 n. (*c*).

DOWNING COLLEGE,
devise of estates for founding, 139.
incorporated, 140 n. (*g*).

DURHAM UNIVERSITY,
established by act of parliament, 333.
lands vested in the dean and chapter of *Durham* for the benefit of, *ib.*
bishop of *Durham* visitor of, *ib.*
lands may be conveyed by *deed* for benefit of, *ib.*

E.

EAST INDIA STOCK,
may be bequeathed to charitable uses, 265, 987—989.

ECCLESIASTICAL PERSONS,
for what term leases may be granted by, 680.
of houses in cities and towns, *ib.*
to what lands the power of leasing by, is confined, 681.
alienation by, when trustees for charities restrained, *ib.*
cannot grant leases with covenants for renewal, 682.
may lease part of lands usually let, reserving proportional rents, 685.
may mortgage, when, *ib.*
may exchange glebe lands, &c. *ib.*
act for facilitating exchange of lands in common fields, extends to, *ib.*
long leases by, under unlimited power, will not be set aside, 686.
bill for enabling, to convey sites for schoolrooms, 985.

EJECTMENT,
demise by trustees in action of, when held sufficient, 711.
may be maintained by majority of trustees, *ib.*
cannot be maintained against schoolmaster, without previous summons, when, 365—367.
grounds of removing a schoolmaster need not be proved on, 735.

ELECTION,
of members of colleges, 717—730. *See* COLLEGE.
of chaplain cannot be made without consent of clergyman, when, 721.
of minister of chapel of ease by whom to be made, *ib.*
of minister, right of, when vested in inhabitants and when not, 722.
of chaplain by major part of corporation, *ib.*
number of trustees directed to be filled up before election of minister, 723.
by heir of surviving trustee not disturbed, when, *ib.*
right of, when vested in inhabitants, 724.
how to be made, *ib.*
right of, by what mode to be established, 725. *See* MAJORITY

ELEEMOSYNARY CORPORATIONS,
what are, 23.
of two kinds, *ib.*
subject to visitation, 329.

ENDOWMENTS,
argument in favour of, 68 n. (*x*).

ENTRY,
within what time to be made by lords on alienations in mortmain, 7, 10.

EQUITY (COURTS OF),
commissioners of charities may certify particulars to attorney general, who may apply to, for obtaining requisite directions as to charities, 848.
power of, to make certificates extended, 874.

ESCHEAT,
lord claiming by, bound by charitable use, 286, 297.

ETON COLLEGE,
appeal to the visitor of, as to the right of fellows to hold livings, 349.
proviso in favour of, in stat. 9 Geo. II. c. 36, s. 4, as to disposition of lands to, 826.
excepted from statute of charitable uses, 817.
powers of charity commissioners, 885.

EVIDENCE,
certificate of attorney general to be, that cases have been certified by charity commissioners, 430, 874.
what was not, to show that property was devoted to charity, 674.
of value of property leased, when rejected, 696.
of lands being dedicated to charitable uses, 192.
presumed from long enjoyment by a parish, 710.
from a recital in an old lease, 711.
from an entry in an ancient book, *ib.*
payment of rent to churchwardens evidence that lands are parish property, 985.

EXEMPTIONS FROM STAT. 9 GEO. II., c. 36.
personal estate not arising from land, 240.
stock in public funds, *ib.*
fixtures, 241.
money given for redemption of land-tax charged on charity estates, *ib.*
for building or repairing parsonage houses, *ib.*
British Museum, *ib.*
annuities not charged on real estate, *ib.*
English universities and colleges, 244. *See* DEVISE.
Queen Anne's Bounty, 255.
particular hospitals, *ib.*
devises by freemen according to the custom of London, 257.
gifts of real and personal estate in Scotland, *ib.*
in Ireland, 262.
real estates in the West Indies, 263.
East India stock, 265, 987—989. *See* COMMISSION OF CHARITABLE USES.
EXCHANGE,
may be made by persons in whom lands are vested for charitable purposes, 850.
application to be made to bishop of the diocese, who may issue commission to ascertain whether an exchange will be beneficial to the charity, 851.
of whom such commission shall consist, *ib.*
commissioners to examine on oath, and may require production of deeds, and direct surveys to be made, and certify to the bishop the matters that shall arise, *ib.*
oath to be taken by the commissioners, 852.
bishop may lay proceedings of commissioners before counsel, *ib.*
a new commission may be issued, 853.
approbation of bishop to be signified by signing and sealing, *ib.*
how deed of, is to be made, *ib.*
deeds of, when enrolled to be produced to the bishop, and a transcript thereof entered in the registry of the diocese, *ib.*
before commission is issued, three months' notice to be given in newspapers, &c., stating particulars, &c. 854.
vacancies of trustees to be filled up prior to any application for an exchange, unless there are six or more trustees, *ib.*
number of trustees who must consent to, *ib.*
where there are no trustees, the bishop may appoint them in cases of, 855.
confirmation of conveyance may be obtained, when, *ib.*
may be effected, although trustees may be proprietors of lands given in, *ib.*
but in such case trustees having no interest to be appointed for purpose of, 856.
in case charity is evicted wholly or in part from lands received, then trustees may enter on lands given in, *ib.*
expense of, how to be paid, 857.
exempt jurisdiction not to affect proceedings of the diocesan, *ib.*
the act for exchange of lands in common fields extends to charities, *ib.* n.

EXHIBITIONS,
transferred from Cambridge to Oxford, in performance of will *cy-près*, 607, 608.

EXONERATION,
bequests of money for, of lands in mortmain, void, 161.

F.

FELLOWSHIP (ENGRAFTED),
subject to the statutes of the college, 354.
unless the gift is subject to particular limitations contrary to the general statutes, 357—359.

FIXTURES,
gift of, to charity, when valid, 241.

FOREIGN CHARITY,
funds of, will be ordered to be paid to trustees of, without a scheme, 260, 262, 655, 656.
trustee of, ordered to be appointed, 990—992.

FORFEITURE,
lands aliened in mortmain, subject to, 810.
who shall take advantage of, *ib.*

FORMS. *See* TABLE OF CONTENTS, xvi.

FOUNDER,
the king is, of civil corporations, 323.
right of visitation incident to, *ib.* 331.
devolves to the crown on failure of heirs of, 337.
may delegate visitatorial power either generally or specially, 345.

G.

GOVERNMENT,
bequest to, in exoneration of national debt, how applied, 82.

GOVERNORS OF A CHARITY,
when they are visitors, 329.
when they have not the visitatorial power, 335.

GRAMMAR-SCHOOLS,
governors of, may make regulations as to amount of master's salary, 585.
master of incorporated, entitled to whole rents, when, 621.
what are, 630.
the court refused to alter the character of, 631—633.
particular will and statutes which were held to create, 633—635.
the teaching of writing and arithmetic has been ordered to be introduced into, 635—638.

GRAMMAR-SCHOOLS (*continued*).
application of funds of, for purposes not for immediate advantage of boys on the foundation, sometimes allowed, 639—645.
as to taking boarders in, how to be determined, 645.
master of, will not be allowed to attend to objects to the neglect of the scholars, 646.
nor to perform duties by deputy, *ib.*
master of parish school must attend personally, although he employs an usher, *ib.*
number of boys to be educated at, settled with reference to master's salary, 647.
when master must prefer boys who are to be taught the learned languages, *ib.*
what religious instruction will be directed to be given at, *ib.*
children of what persons to be admitted into, 648.

HARROW SCHOOL,
information as to the misapplication of the funds of, 640—645.

HEIR AT LAW,
entitled to real estates devised to charitable uses, 204.
resulting trust for, when it arises, 205.
entitled to interest in realty undisposed of, *ib.*
to void charges on realty given to a charity, when, 206—208.
to benefit of rent charge given to charity, 208, 209.
entitled to so much of the produce of realty as is ineffectually given to charities, 220.
a particular sum directed to be invested in lands arising from realty, 221.

HEWLEY'S (LADY) CHARITY,
Unitarians not objects of, 749—761.

HIGHGATE SCHOOL,
intended for classical instruction, 633—635.

HIGHWAYS,
lands given for the maintenance of, may be leased for what term, 708.
powers of new act for regulating, extend to charities, 709 n. (*u*).
rate to be levied for support of, 788.

HOSPITALS,
may be incorporated by founders, 43.
what to be observed in, 45, 46.
of royal foundation to be visited by ordinaries under king's commission, 327.
other hospitals to be visited by ordinaries, *ib.*
founders of, may appoint visitors, 328.
having visitors exempted from stat. of charitable uses, 293, 328.
for what term leases may be granted by, 681.
covenants for renewal of leases by, not binding, 682. *See* LAND TAX; RATES.

HOSPITALS (*continued*).

Greenwich Hospital,
when founded, 46.
enabled to take lands, *ib.*
liable to church rates, 789.

Royal Naval Asylum,
enabled to hold lands, 47.

Seamen's Hospital Society,
incorporated with power to take and hold lands, 47.

St. George's Hospital,
governors of, incorporated with power to hold lands, 48.

Magdalen Hospital,
may take lands, 256.

Bath Hospital,
enabled to acquire lands, *ib.*

Lying-in Hospitals,
none to be established for the reception of pregnant women unless a license be obtained, 828.
justices at quarter sessions are empowered to grant such license, *ib.*
every license to be stamped with a 5*s.* stamp, and signed by the justices, *ib.*
hospitals established at passing of act and thereafter to be established for the reception of pregnant women to be deemed within the act, *ib.*
inscription to be affixed over the door of such hospitals, 829.
the substance of the other provisions respecting, *ib.*

I.

INDICTMENT,
will lie against corporation for not repairing buildings, &c. when, 424.

INFORMATION,
right of the attorney general to proceed by, 399.
consent of attorney general required in proceedings by, 400.
attorney general to be employed in, 401.
how it differs from a proceeding by bill, 402.
objects generally sought to be attained by, *ib.*
cannot be filed without attorney general's consent, *ib.* 403.
will not be stayed on defendant's motion because filed without relator's consent, *ib.*
consideration of, may be submitted to attorney general, *ib.*
may be filed against governors of charities who have the management of revenues, 409.
the attorney general a necessary party to, 411.
protestant dissenters may proceed by, 415, 416.
may be preferred respecting funds applicable to public purposes, 420—424. *See* ATTORNEY GENERAL, RELATOR.

INFORMATION, (*continued*).
abatement of, 427.
all persons interested in subject of the suit must be parties to, 430.
where particular persons must be parties to, 431, 432.
whether all parties liable to payment of rent charge for charity must be made parties to, 433—437.
directions will be given for establishing charities notwithstanding informality in, 444.
want of form in, will not be overlooked to the prejudice of defendants, 446.
court cannot consider whether information is beneficial or not, except with reference to costs, 989.
forms of, 892—943. *See* CONTENTS, xvi.

INHABITANTS (POOR),
who entitled to the benefit of a gift to, 63.
who are meant by the word inhabitants, *ib.* n. (*i*).

INJUNCTION,
will be granted to prevent trustees from doing acts detrimental to charity, 415.
when refused for restraining the granting of leases, 696.

INNS OF COURT,
not incorporated, 33.
mode by which their property is transmitted, *ib.*
how visited, 392.

INROLMENT,
conveyance to charitable uses must be inrolled within six months after execution, 129.
execution by grantor before, sufficient, 130.
only required of original gift, *ib.*
will not be presumed, *ib.*

INTEREST,
general rule as to, on legacies to charities, 239.
charged on balances at 5*l. per cent.*, when, *ib.*

IRELAND,
license to alien lands in mortmain may be granted by crown, 39.
the stat. 9 Geo. II. c. 36, does not extend to, 122.
real and personal estates in, may be given to charitable uses, 262.
commissioners are appointed for the administration of charitable gifts in, 263.
the stat. 43 Eliz. c. 4, does not extend to, 60.
endowment of schools in, for Roman Catholics, illegal, 110.
bequest to Roman Catholic bishops in, void, *ib.*
devise of lands in, to Catholic bishop and priest in, void, *ib.*
table of statutes relating exclusively to, 889.
statutes cited relating exclusively to, *See* TABLE OF STATUTES CITED.

JEWS,
trusts for propagating religion of, illegal, 105.
bequest for maintaining a synagogue, illegal, 107.
action for rents of seats in synagogue may be sustained, *ib.*

JEWS (*continued*).
may be objects of charitable trusts, 107.
not objects of *Bedford* grammar-school, *ib.*
whether the stat. 53 Geo. III. c. 160, extends to, *quære*, 106, n. (*m*).

JUDGMENT,
bequest of money secured by, to charity is void, 164.

JURISDICTION,
the Court of Chancery has not, over charities founded by charter, 268.
origin of, to proceed by information, 268, 269, 277, n.
by commission of charitable uses, to what cases it does not extend, 292—294.
extends to cases where governors are trustees of funds, 295.
of chancery excluded where there is a special visitor, 346.
when the Court of Chancery has not, 408.
of chancery with respect to protestant dissenters, 415. *See* PETITION, VISITATION.

K.

KING'S COLLEGE (LONDON),
founded by charter, 325, n. (*a*).
enabled to hold and alien lands, *ib.*
Archbishop of Canterbury visitor of, *ib.*

L.

LAND TAX,
exemption of charities from, in acts relating to, 790.
may be redeemed on payment of what consideration, 791.
hospital, when exempted from, *ib.*
buildings in a college, when exempted from, *ib.*
all corporations and trustees for charities may contract for redemption of, 792.
trustees of charities may sell, &c. lands for redeeming, *ib.*
governors of charity for relief of widows and children of clergymen, with consent of land tax commissioners, may sell lands given by will for redeeming, *ib.*
may be redeemed out of rates, 793.
out of property applicable to charities, *ib.*
out of legacies given to charities, *ib.*
money may be given by will for redeeming land tax on charities, *ib.* 241.
lands belonging to charities may be sold and mortgaged for redeeming, 793.
corporations and trustees for charities may redeem land tax charged on glebe lands, &c. 794.
in contracts for redemption of, direction may be inserted that lands redeemed shall not be subject to rent-charge, *ib.*
proviso where there is no such direction, *ib.*
memorial to commissioners, when to be presented, 795.
several small charities have been exonerated from, *ib.*

LAND TAX (*continued*).
sales of, by corporations and trustees for charities confirmed, where part of the tithes, &c. sold may not have been rated to, *ib.*
where tenants at rack-rent are bound to pay land tax on lands exonerated from, the amount shall be considered as rent reserved, 796.

LEASES,
by municipal corporations restrained, 678.
by ecclesiastical persons, 680.
by hospitals, 681.
with covenants for perpetual renewal, when void, 682, 683.
established in pursuance of an award, *ib.*
contract by college to grant, not enforced, when, 685.
under an unlimited power, not set aside, 686.

Of Estates belonging to Charities,
long lease decreed by court of equity not set aside, 689.
with covenants for renewal, when sustained, 691.
where granted according to usual practice and upon reasonable terms, 692.
for lives on payment of fine and small rent according to custom of the country, not set aside, 694.
mode of granting, sometimes left to decision of master, 695.
which cannot be sustained, 697.
where granted at undervalue, *ib.*
for an unreasonable long term, 698.
for 99 years, for purposes of husbandry, 699.
persons taking and granting, bound to show reasonableness of terms of, 700.
set aside although person granting was not a naked trustee, 701.
mode of granting, how directed, 702.
directed to be cancelled *in toto*, 703.
on setting aside, allowance will be made for lasting improvements, when and when not, *ib.*
directions of founder as to, how far to be observed, 704.
notice to lessee that estate belongs to charity, not notice of breach of trust, 705.
how far underlessees will be affected by setting aside original, 706.
mere length of term not always ground for setting aside, *ib.*
inquiry directed to be made by master as to reasonableness of terms of granting, *ib.*
persons incapable of taking, 707.
of lands given for the maintenance of highways, 708.
miscellaneous points relating to, 709. *See* TIMBER.

LEASEHOLDS,
bequests of, to charities, void, 154.
legatee of, entitled to benefit of void condition in favour of charity, 214.

LEASEHOLDS (*continued*).
specific bequest of, for charity, held to fall into general residue, 214.
executors held to be trustees of, for crown, where testator had no next of kin, 213.

LEEDS GRAMMAR-SCHOOL,
commercial education not introduced into, 631—633.

LEGACY,
substituted, payable out of same fund as original, 164.
principle in the case of specific, 596.
demonstrative, what, *ib.*
not adeemed by receipt of particular things enumerated, 597. *See* BEQUESTS.

LEGACY DUTY,
payable on bequests to charities, 773.
statutes imposing, *ib.*
certain articles exempted from, 774.
all legacies, whether to individuals or to bodies corporate or societies, liable to, 775.
bequest to distribute sums in 10*l.* or 15*l.* when and when not liable to, 776.
bequests for a numerous body held liable to, 777.

LENGTH OF TIME,
an important circumstance against setting aside transactions respecting charities, 563, 565, 601, 689.

LICENSES IN MORTMAIN,
antiquity of, 35.
origin of right of the crown to grant, 35, 36.
how obtained, 37.
when considered necessary, 38.
act of parliament enabling the crown to grant, 39.
effect of, 40.
do not determine by death of king, *ib.*
charters of incorporation usually contain a limited license to purchase lands, *ib.*
usually limit the amount in value of lands, 41.
how obtained, *ib.*
must be obtained by colleges taking by devise, 251.
form of, 891.

LIEN,
of vendor for unpaid purchase money, is an interest in land within 9 Geo. II. c. 36, p. 163.

LIMITATIONS (STATUTE OF),
does not apply in cases of charity, 286, 563, 564, 601, 689. *See* 2 Vern. 399.
provision in new act as to recovery of arrears of rent and interest, 455, n. (*w*).

LONDON,
devise by freeman according to the custom of, not within the statute of mortmain, 9, 257.

LUNATIC,
when visitor, the right of visitation to be exercised by lord chancellor, 341.

LUNATIC ASYLUMS,
visitors of county, may take and hold lands, 49.
for counties, how to be assessed for taxes and rates, 785.

M.

MAJORITY,
of persons incorporated may do any corporate act, 722.
of persons entrusted with powers of general nature may bind minority, 725.
of vicar and churchwardens may elect schoolmaster, when, 726.
of trustees of charity may elect schoolmaster, 727.
of electors may rescind an election, when, 728.

MANDAMUS (WRIT OF),
issues from King's Bench, 381.
supplies the want of another remedy, *ib.*
party applying for, must make out legal right, *ib.*
will not be granted unless party has no other specific remedy, *ib.*
refused for admitting a stipendiary curate by nominee, 382.
lies for restoring to offices having certain rights, *ib.*
to restore party to his academical degrees, 383.
to admit a dissenting minister to the use of his chapel, *ib.*
to justices to allow dissenting minister to take oaths, 384.
party applying for, must show *primâ facie* title, 385.
granted to compel warden of college to affix seal to an answer in chancery, *ib.*
to visitor to admit one of two persons master of a college, 386.
will lie to compel visitor to hear an appeal, 388—390.
will not lie to restore a fellow of a college, 392.
nor to admit a barrister, *ib.*
nor to control discretion of benchers of inns of court in admitting members, *ib.*
nor to admit a doctor of civil law, 393.
nor for examination of a doctor of physic, *ib.*
nor to compel visitor's officer to execute sentence, *ib.*
nor to trustees of charity to increase allowance to objects of charity, 394.

Return to,
must state sufficient reason for not obeying, 395.
may be general, that there is a visitor, *ib.*
for restoring a schoolmaster, what should be stated in, 396.
held insufficient where there was no statement that party had been summoned, 397.
by ordinary, that he had suspended party until submission to examination, 397.

MANDAMUS (WRIT OF) (*continued*).
return must be made to first writ of, 397.
costs of, in the discretion of the court, *ib.*
interpleader act extends to applications for, 398.

MANOR,
lord of, where seised in fee, may grant five acres of the waste for ecclesiastical purposes, 841.
grants by, restricted to parochial churches and chapels, *ib.*
bill for enabling lord or lady of, to convey sites for school-rooms, 985.

MARSHALLING. *See* ASSETS.

MELIORATION OF LANDS IN MORTMAIN,
bequests for, valid, 188.
building a new parsonage house on glebe, 189, 190.
to repair a chapel, 189.
for endowing a hospital, *ib.*
gifts for, invalid, unless testator points to lands already in mortmain, 192—194.

MEMBERS OF PARLIAMENT,
right of voting for, 798.
by schoolmasters, *ib.*
dissenting ministers, 800.
when receipt of alms is or is not a disqualification for voting for, 802. *See* ALMS.
of charity is or is not a disqualification, 803—807. *See* CHARITY.

MONASTIC ORDERS,
of men prohibited, 90, n. (*h*).
of women allowed, *ib.*

MORTGAGES,
bequests of, whether in fee or for terms of years, to charities, void, 154—157.

MORTMAIN,
meaning of the term, 2.
conjectures as to the origin of, *ib.*
alienations in, first prohibited by clauses in conveyances, 5.
prohibited by *Magna Charta*, *ib.* 809.
right of entry given to lords and the king by stat. 7 Edw. I. pp. 6, 7, 809.
what alienations come within the stat. *de religiosis*, 8.
long terms of years, 9.
statutes of, evaded by common recoveries, 12.
by conveyances to *use* of religious houses, 16.
remedy given in case of mortmain by recovery of land by default, 810.
setting up crosses caused same forfeiture as in alienations in, 811.
consent of mesne lords required in alienations in, *ib.*

MORTMAIN (*continued*).
conveyances of lands for churchyards declared to be alienations in, 812.
to use of religious persons, 813.
purchase of lands to guilds, fraternities, offices, and commonalties within prohibitions of, *ib.*
statutes of, suspended for twenty years in favour of *spiritual* corporations, 42.

MULTIFARIOUSNESS,
the nature of, 449.
demurrer for, allowed on allegation that divers other legacies had been given, 450.
where the charities sought to be established were distinct, 451.
where charge was that defendants were seised of some estates for purposes of public utility, and of others for private charity, 452.
leave given to amend in order to avoid, *ib.*
objection to bill or information on account of, must be by demurrer, *ib.*

N.

NAVIGATION,
bequests of shares in, to charities, void, 160.
shares in, declared to be personalty, *ib.*

NECESSARY IMPLICATION,
meaning of the term, 205, n. (*a*).

NEXT OF KIN,
entitled to void gifts of personalty to charities, 204, 206.
release from, not presumed, 225.
personalty given to charities, decreed to, notwithstanding an assignment to trustees, 226.

NOMINATION,
right of, when vested in trustees, as to scholars, 768.
of a lecturer by trustees, when held sufficient, *ib.*
in whom the right of, of objects to receive benefit of rent charge was vested, 769.
of almspeople, when vested in founder and his heirs, *ib.*
general object of charity not permitted to fail by neglect of persons having right of, *ib.*
right of, given to queens of *England* held good, 771.

NORMAN'S CHARITY,
for binding apprentices, 780.

NOTICE,
purchasers without, exempt from statute of charitable uses, 296.
sub-purchaser without, bound by notice to original purchaser, 297.
what will bind, *ib.*
purchaser of land subject to rent charge, liable to it without, 298.
to lessee that land belonged to a charity, 705.

O.

OFFICE,
what it is, 797.
when right to lands will pass by grant of, *ib.*
interest in, how determinable, *ib.*
may be granted at will, 798.
holder of lands in right of, may vote at county elections, *ib.*

P.

PARISH,
not answerable for misapplication of charity funds like a corporation, 438.
charitable funds lost, because no mode of suing a, 439.
suggestions for establishment of charity boards for parishes, *ib.*
funds belonging to, not liable to make good money which has been misapplied, 442.

PARISH CHURCH,
bequest to, how construed, 71.

PARSONAGE HOUSES,
lands, &c. may be given for, 52.
how lands, &c. given for, are to be conveyed, 52.

PATRONAGE,
rights of, may be aliened, 713.

PENSIONS AND ALLOWANCES,
when, to whom, and how to be secured, under act for regulation of municipal corporations, 807.

PETITION,
in cases of breaches of trust, petition may be presented under 52 Geo. III. c. 101, to the lord chancellor, who shall hear the same in a summary way, and make order therein, 481.
appeal against order may be made to the House of Lords, 482.
intention of the above act, *ib.* n. (*d*).
under the above act to be signed by persons presenting it, and allowed by attorney or solicitor general, 483.
to what cases the above act applies, *ib.*
under the control of the attorney general, 484.
order made on, without authority of attorney general, a nullity, 485.
cannot be presented by one person under the above act, *ib.*
to what cases the above act is confined, *ib.*
inquiry may be directed on, for ascertaining lands belonging to charity, 486.
after reference on, subsequent orders may be obtained by motion, *ib.*
accounts of personal estate cannot be taken on, *ib.*
terms of lease agreed to be granted, cannot be varied on, 487.
petition and information cannot proceed together, *ib.*
attorney general will be ordered to certify whether petition or information shall proceed, 487.

PETITION (*continued*)
charity founded by charter may be regulated on, 488.
constructive trust not within the above act, *ib.*
case to which remedy by, did not extend, 488—490.
conflicting claims of two charities may be decided on, *ib.* 491.
jurisdiction on, does not extend to charity supported by voluntary contributions, 492—494.
all parties to breach of trust must be before court, 494.
remedy by, may be barred by laches, *ib.*
mode of proceeding on, 495.
a stranger to, cannot appeal to House of Lords against order on, 496.
may be presented by trustees under 59 Geo. III. c. 91, where regulations are insufficient for a due administration of the funds of any charitable institution, *ib.*
by attorney general, for what purposes presented, 497.
for the appointment of new trustees, 498—506. *See* TRUSTEES.
may be presented to lord chancellor, &c., in cases where money given for binding apprentices is misemployed, 823.
forms of, 947—956.

Under Private Acts of Parliament,
with respect to St. Catherine's Hospital, Ledbury, 508.
Birmingham free grammar-school, *ib.*
Bedford charity, 509.

PLEA,
averment in, when necessary, 447.
of the stat. 9 Geo. II. c. 36, p. 448.

POCKLINGTON GRAMMAR-SCHOOL,
case respecting scholars to be sent from, 594—596.

POOR LAW COMMISSIONERS,
may call for and publish accounts of trust and charity estates, 322.

POOR RATES,
bequest of money secured on, to charities, void, 158, 160.
when charitable institutions are and are not liable to, 783—785.
conveyance in aid of, held to create a charitable use, 63. *See* RATES.

POWER,
defective execution of, aided in equity in favour of charity, 516.
of distributing fund, when coupled with an interest, 526.

PRESUMPTION,
of dispensation with college statutes from usage, 347.
of repeal of bye-laws, 350—351.

PRISONERS (POOR),
the chief justices and others directed to inquire into charities given for the benefit of, 824.
directions in scheme for applying money for, 964.

PROHIBITION,
lies against visitor exceeding his authority, 379.
against interfering with right of visitation of the crown, 333.

PUBLIC PAROCHIAL FUND,
what is not, within the stat. 56 Geo. III. c. 139, s. 11, p. 781.

PURCHASER,
of land without notice not liable to charitable use, 297. *See* NOTICE.

PURCHASES,
for charitable uses not avoided by grantor's death within twelve months, 119, 131.
may be made where direction of court is not required, 132.
cannot be indirectly affected by trustee after testator's death, *ib.*
decree for purchase of lands for charity not enforced, *ib.* 133.
consideration must be paid by the person for whose benefit the conveyance is made, 136.
money laid out for enlarging a chapel not a consideration within the 2nd sect. 9 Geo. II. c. 36, *ib.*

Q.

QUEEN ANNE'S BOUNTY,
governors of, may take lands by deed, 51.
personal estate by will, 255.
churches, curacies, and chapels augmented by, incorporated, with power to take lands, 52.
donatives augmented by, subject to visitation, 326.
proviso in stat. 9 Geo. II. c. 36, intended to apply to, 133, 134.
persons were empowered by 2 & 3 Anne, c. 11, to grant estates, &c., in their own right, to the governors of, towards the augmentation of the maintenance of the clergy, 830.
the above act to remain in force, notwithstanding the stat. 9 Geo. II. c. 36, p. 831.
lands belonging to living augmented by, may be exchanged, *ib.*
where no suitable parsonage house, one may be provided by governors of, 832.
bishops and guardians to inquire into value of benefices returned into the exchequer, and certify the same to governors of, 836.
governors of, empowered to act upon such new certificate as they were enabled to do with respect to livings returned into the exchequer, *ib.*
certificates not to affect livings with respect to their discharge from first fruits and tenths, 837.
provision for facilitating the intentions of persons disposed to contribute towards augmentation of livings, *ib.*
the laws respecting the gift or conveyance of lands, &c. not to be affected, *ib.*

R.

RATES,
bequests of money secured on poor and county, to charities, void, 158.
trustees or governors of hospital not liable to poor, 783.
nor founder of charity, *ib.*
nor person occupying apartments as servant, *ib.*

RATES (*continued*).
churches and chapels exempted from church and poor, 784.
land purchased for county lunatic asylum exempted from, 785.
occupiers of lands dedicated to charity liable to poor, *ib.*
schoolmaster, *ib.*
inhabitants of almshouses, *ib.*
trustees of lunatic asylum whereof a profit was made, 787.
for support of highways, on what property to be assessed, 788.
Greenwich Hospital liable to church, 789.

RECOVERIES (COMMON),
origin of, 12, 13.

REAL SECURITY,
meaning of the term, 160.

RECOMMENDATION,
words of, will create a trust, 141, 142.

REGISTRATION OF CHARITABLE DONATIONS,
the act 52 Geo. III. c. 102, for, 842.
a memorial of deeds, &c. respecting charitable donations already founded to be registered, *ib.*
the like of charitable donations which may hereafter be founded, *ib.*
clerks of the peace to provide proper books wherein registries shall be made, 843.
such book to contain an index of the name of the founder or the title of the charity, *ib.*
notice to be given in *London Gazette* if persons to be benefited shall not be wholly within one county, *ib.*
if donations shall not be registered, a petition may be presented to the lord chancellor, &c., complaining thereof, *ib.*
no proceedings under the act to decide any right or title, 844.
clerk of the peace to make searches and give copies of registers, *ib.*
allowance to clerk of the peace, and to the person inserting notification in the gazette, *ib.*
further time to be allowed to register memorial where difficulties occur in preparing, *ib.*
costs attending the preparing of memorials to be allowed, *ib.*
the act not to extend to any donation not secured upon lands, nor to certain charitable institutions, 845.
nor to any royal foundations, nor to certain institutions, *ib.*
nor to charitable institutions of Quakers, 846.
nor to charitable foundations the accounts of which are directed to be passed in the Court of Chancery, *ib.*
divers charities may be stated in the memorial, *ib.*
saving power of superintendence over charities, *ib.*
form of memorial contained in the act, 847.

RE-HEARING,
application for, to be by petition, 454.
when petition for, must be presented, *ib.*
upon application of defendant, allowed, when, *ib.*

RELATIONS,
bequest to poor, may create a charitable use, when, 64.
as for putting out poor relations apprentices, *ib.*
for establishing a school for education of, 66.
distribution of the fund in gift to poor, *ib.*
to relations the greatest objects of charity, 67.

RELATOR,
any person may become a, on behalf of a charity, 424.
introduced by the attorney general to be answerable for costs, 425.
is required for benefit of the subject, *ib.*
has been required to give security, *ib.*
needs not have any interest in charity, *ib.*
inhabitants may be, 426.
trustees may be, to set aside improvident leases, *ib.*
death of, where there are several, does not abate suit, 427.
a new one may be appointed, *ib.*
application for appointment of new, may be made by attorney general, *ib.*
cannot dismiss information without attorney general's consent, *ib.*
the attorney general may proceed without a, 428.

RELIGIOUS HOUSES,
dissolution of, 20.
their utility, 43, n. (*x*).

RENT CHARGE,
whether all persons liable to payment of, must be parties to a suit for recovery of, 433—437.
purchaser of land when liable to, 298—300.
might be revived by commissioners of charitable uses, when, *ib.*
form of information for recovery of, 910—916.

RENT,
direction by founder that rents shall not be raised, inoperative, 704.

REQUEST,
words of, will create a trust, 141.

REPORTS OF HOUSE OF COMMONS,
contents of reports on the education of the poor in the metropolis, 304.

RESERVATION TO GRANTOR,
trust to keep up grantor's tomb is not, within 9 Geo. II. c. 36, p. 124.
nor a power for the grantor to appoint the objects of the charity and to make regulations, 127.
nor the circumstance of the grantor being incumbent of the living granted, 129.

RESIDUE,
gift of, when confined to specific sum, although legacies have lapsed, 596.
what is generally included in gift of, 116, n. (*k*).

RESULTING TRUST,
collection of cases showing when there will be, for heir at law, 205, n. (*c*).
when there will not be a, 210, n. (*n*).
See HEIR AT LAW.

ROMAN CATHOLICS,
excepted from toleration act, 102.
alteration of the laws respecting, 109.
liable to penalties for keeping schools, *ib.*
incapable of being master of any endowed college or school, *ib.*
endowment of schools for, prohibited, *ib.* 110.
relief granted to, by recent act, 111.
does not enable, to hold offices in the church, or in the universities, or in colleges, *ib.*
by recent act placed upon same footing with Protestant dissenters as to schools and places of religious worship, 112, 876.
act not to affect suits then pending, 112, 877.
nor to repeal certain provisions for suppression of religious societies, 877.
property acquired by, to be subject to the provisions of 9 Geo. II. c. 36, pp. 112, 877.
stat. 2 & 3 Will. IV. c. 115, decided to be retrospective, *ib.*
schoolmasters, when required to take oath, to take that prescribed by 10 Geo. IV. c. 7, p. 876.

RUGBY SCHOOL,
decision as to the application of the revenues of, 639.

'S.

SAINT CATHERINE'S HOSPITAL,
appointment of master of, belongs to the queen for the time being, 771.
right of queen consort does not cease on becoming dowager, *ib.* n. (*r*).

ST. JOHN'S COLLEGE, CAMBRIDGE,
alteration of statutes of, as to admission of fellows, 348. n. (*c*).

SCHEME,
when directed for the application of charitable funds, 651.
where the bequest is to *trustees* for charitable purposes generally, *ib.*
reference for settlement of, may be made on petition, *ib.*
where blanks were left for names of charities, *ib.*
where the particular purpose failed, *ib.*
frequently directed where an unlimited discretion is given to trustees as to the distribution of the funds, 652.
where there had in some respects been a departure from founder's intention, *ib.*
provision for residence of a lecturer was introduced into, although not required by founder's will, 652.
provision for the increase of amount of loans was allowed to be introduced into, 653.

SCHEME (*continued*).

where surplus is to be distributed, it should be divided into *aliquot* parts, 653.
attendance of the attorney general on settlement of, sometimes dispensed with, *ib.*
not directed where temporary income is to be disposed of according to a discretion to be exercised yearly, 654.
funds given for support of charities out of England will be ordered to be paid without settlement of, 260, 262, 655, 656.
provision for appointing new trustees sometimes inserted in, 736.
forms of, 956—978.

SCHOOLMASTERS,

appointment and removal of, 725.
may be chosen by majority of electors, 726—728. *See* MAJORITY.
must subscribe declaration of conformity, *ib.*
right to elect, not vested in visitor, when, 729.
not subject to lapse, 730.
have sometimes a freehold in their office, *ib.*
may have an estate neither for life nor at will, but depending on special contract, *ib.*
dismissal of, not valid, 731.
votes of vestry in dismissing, how to be taken, *ib.*
dismissal of, from corrupt motives, will not be allowed, 732.
general resignation bond given by, whether valid, *quære*, *ib.*
practice of the Court of Chancery as to removal of, 733.
when office of, is incompatible with that of vicar of the parish, *ib.* 734.
of endowed school, cannot be ejected before interest has been determined by summons, 365, 735.
enjoying lands by virtue of their office may vote, 798.
instances where right of voting was vested in, *ib.*
removable at pleasure cannot vote, 799.
having only a temporary appointment cannot vote, *ib.*

SCOTLAND,

bequest of produce of real estate in England for charity in, void, 166—168.
money to be laid out in England, or in, may be good where there is an option in the trustees, 172.
term mortification in law of, synonymous with mortmain, 3.
grant of lands to religious houses in, prohibited, *ib.*
gifts of real and personal estates in, exempted from statute 9 Geo. II. c. 36, pp. 122, 257.
lands in, may be granted for charitable purposes, *ib.* n. (*e*).
same solemnities required for grants to charities as in other cases, *ib.*
alienation of lands given for charitable uses held valid, *ib.*
produce of real estate in *England* cannot be given for charitable purposes in, 258.
money may be given for investing in heritable securities in, for charities, *ib.*

SCOTLAND (*continued*).
directions not given by Court of Chancery for establishing charities in, 260.
money in England given for charities in, will be ordered to be paid to trustees, 260—262.

SECRETARY,
of a dissolved charitable institution in action for salary must produce agreement under which he claims, 772.

SIGN MANUAL,
when the application of charitable funds is to be made by king's, 269.
where there is an indefinite purpose without the interposition of trustees, 270—272.
where the donee of a power died without exercising it, 272.
where the executor renounced probate, 992.
where property is given to superstitious uses, in their nature charitable, 99, 100.
right of crown to appoint by, does not arise until failure of charity, 273.

SPIRITUAL ASCENDANCY,
gifts set aside on account of, 116.

STAMP DUTY. *See* APPRENTICES; LEGACY DUTY.

STATUTES CITED. *See* TABLE OF STATUTES CITED.

STOCKS IN PUBLIC FUNDS,
to be laid out in lands for charitable uses must be transferred six months before the death of grantor, 119.
exception where transfer is made *bonâ fide* for valuable consideration, *ib.*
may be bequeathed to charities, 240.

SUPERSTITIOUS USES,
definition of, 88.
gifts which have been construed to be, 89.
to support Catholic establishments abroad, 90.
for the superior of a convent, *ib.*
for disseminating a work asserting the supremacy of the pope, *ib.*
lands given for, vested in the crown, when, 93.
what were forfeited to the crown, 95, 96.
when gifts were construed not to be, 97, 98.
intent to convey to, inferred from donor's opinion, 98.
power of crown to appoint to other uses where gift is to, 99, 100.

T.

TIMBER,
when it may be cut by lessee, 712.
when waste to cut, *ib.*
cut by reversioner expectant on term given to charity, *ib.*
discretion of trustees as to cutting, how to be exercised, *ib.*

TOLERATION (ACT OF),
dissenting ministers exempted from penalties by, 102.
repeal of part of, in favour of Unitarians, 103.

TOLLS,
bequest of, to charities, void, 158.

TONBRIDGE GRAMMAR-SCHOOL,
decisions as to the right of, to the surplus rents of estates given for the support of, 551—556, 575—579.
construction of a gift for the support of a scholar to be sent from, 579—582.

TRINITY,
persons impugning the doctrine of, liable to punishment under stat. 9 & 10 Will. III. c. 32, p. 102.
partial repeal of that act in favour of Unitarians, 103.

TRUSTS,
by what words created, 141.
words of recommendation, &c. *ib.* 142.
honorary and secret, are within the stat. 9 Geo. II. c. 36, p. 144.
parties will be compelled to disclose secret trusts for charities, 147.
breach of, to pull down chapel, 739.
damages for breach of, will not be awarded by Court of Chancery, 740.

TRUSTEES,
principle on which accounts in charity cases are directed against, 456. *See* ACCOUNTS.
office of, honorary, 467.
entitled to costs, charges and expenses, when and when not, 467—469.
refusing to execute conveyances, not allowed costs, 470.
when allowed costs as to private acts of parliament, and when not, *ib.*
ordered to pay costs in some cases, 471.
of charities chargeable like other trustees, *ib.*
ordered to pay costs of conveyance to new trustees, when, 472.
costs of, when made parties in two capacities, 473.
taxation of costs of, *ib.*
when only allowed costs as between party and party, 474.
being lunatics, the committee of, may be directed by lord chancellor to convey, 498.
and to transfer stock or funds standing in their names and to receive dividends, *ib.*
being lunatic, a person may, before inquisition, be ordered to convey or transfer, 499.
being infants, may be ordered to convey, *ib.*
provision as to, in counties palatine, *ib.* 990.
being out of the jurisdiction of the court, may be ordered to convey land, 499.

TRUSTEES (*continued*).

to assign leaseholds, 500.
to transfer stock, *ib.*
how order for conveyance under trustee act is to be obtained, 501, 990.
having a beneficial interest, are within the trustee act, 502.
husband of a female trustee within the act, *ib.*
the trustee act extends to charities and friendly societies, *ib.*
may be appointed without a suit, when, 503.
the Court of Chancery may appoint trustees of charities on the petition of the person administering such charity, or any person on behalf thereof, *ib.* 504.
manner of proceeding where trustees, defendants in equity, cannot be found, *ib.*
filling annual offices, removed, 507.
not appointed without reference to the master, *ib.*
property vested in bodies corporate as trustees for charitable purposes, to continue so until 1st August, 1836, p. 507.
vacancies among, may be supplied, 508.
new trustee, how long to retain his trust, *ib.*
lord chancellor, prior to 1st August, 1836, to regulate trust estates vested in corporations for charities, *ib.*
when not justified in applying revenues of school in enlarging a chapel, 638.
ejectment by, 711.
majority of, may maintain ejectment, *ib.*
to what rule subject with regard to cutting timber, 712.
proper powers for the appointment of, should be inserted in deeds founding charities, 736.
power of appointing, enlarged by private act of parliament, *ib.*
right of survivor of, to appoint new trustees, when not determined, *ib.*
where number had not been reduced to that specified, 736.
information to remove, on account of not being inhabitants, dismissed, 737.
heir of founder, when a necessary party on the appointment of new, 738.
when official trustee did not forfeit his character of trustee under a previous appointment, *ib.*
municipal corporations frequently constituted, *ib.*
what are sufficient grounds for removing, 739.
one of several, may have others removed for breach of trust, *ib.*
when deviation from terms of trust will be allowed, 740.
mode of calculating fines to be paid by, on admission of, to copyholds, 741.
of dissenters' charities will not be allowed to deviate from original object of foundation, 742.
professing opinions at variance with the object of the charity will be removed, 749, n. (*s*).
being Unitarians, will be removed as trustees for a Trinitarian establishment, 752.
when entitled to nominate scholars, 768.
what was a sufficient appointment of a lecturer by, *ib.*

V.

VESTRY,
to make out and publish yearly a list of estates, charities, and bequests, &c. with the application thereof, 321.
powers of, where parishes are divided by the commissioners for building new churches, 660.
votes of, in dismissing a schoolmaster, how to be taken, 731.

VISITATION,
(1) *Origin of visitatorial power,*
civil corporations subject to jurisdiction of King's Bench, 323, 324.
of spiritual corporations belongs to the ordinary, 325.
of donatives augmented by Queen Anne's Bounty, 326.
of churches and religious houses of monasteries belongs to the ordinary, *ib.*
power of ordinary in, *ib.*
of hospitals, 327.
of hospitals, belongs to founder or his nominee, 328.
of incorporated charities, belongs to founder, 329.
power of, incident to eleemosynary corporations, *ib.*
forum of visitors, a convenient jurisdiction, 330.
power of, derived from property of donor, 331.
of corporations for charity, belongs to founder, *ib.*

(2) *In Right of the Crown,*
royal foundations subject to visitation of crown, 333.
exercised by the lord chancellor, 335.
of charities, on failure of heirs of founder, devolves to the crown, 337.
extends to new gifts to royal foundations, 339.
devolves to the crown where visitor is a lunatic, 341.
in appeals to lord chancellor as visitor for crown, its interest must be represented by attorney general, 342.
exercised by lord chancellor, not part of his equitable jurisdiction, *ib.*

(3) *Appointment of Special Visitors,*
of eleemosynary foundations, may be delegated by founder, 343.
technical words not necessary for, *ib.*
words which amounted to, 344.
exception of power on, 345.
power of visitors may be divided, *ib.*
engrafted fellowships, subject to the visitor, 354.
property given for purposes contrary to the statutes of a college not subject to, 357.

(4) *Powers of Visitors,*
are limited by the statutes, 360.
visitor is the judge of the private statutes, *ib.*
visitor not bound to proceed according to common law, 361.
decisions of visitors are conclusive, *ib.*
do not extend to independent members, 362.

VISITATION (*continued*),
visitors cannot determine a dispute between a college and a third party, 365.
may determine right of fellows to let their chambers, *ib.*
parties must be summoned on, *ib.*
visitors cannot dismiss school-master who has not been summoned, *ib.*
nor be a judge in his own cause, 367.
powers of, may cease and revive, *ib.*
visitors may deprive and amove members, 368.
questions belonging to visitor cannot be decided by a court of equity, 370.
sentence of visitor not examinable in courts of law, 375.
visitor can only visit at time appointed by statutes, 377.
acts not amounting to a general visitation, 378.
to be regulated according to the statutes, 379.
visitor not bound by particular forms, 380.
submission to visitor does not give him power, *ib.*
visitor may be compelled by mandamus to receive an appeal, 388.
may determine grievance which happened in his predecessor's time, 396.
entitled to costs, 470.
costs of, for visiting a school directed to be increased, 471.

U.

UNCERTAINTY,
gift to one hospital, where there were two in the place, not void for, 523.
bequest void for, where part of gift is void, 200, 203, 662.
where no trust is effectually created, *ib.*
where gift was to purchase and circulate books tending to promote the happiness of makind, 663.
where no administration of trust can be directed, 664.
gift not void for, where one term of option given can be executed, *ib.*
nor where a *general* charitable purpose is expressed, 665.
nor where particular objects have failed, *ib.*
nor where nothing but mode of execution is left in, *ib.*
nor a gift for the benefit of poor dissenting ministers in England, 104, 105.
gift void for, where fund is given to charitable purposes, and others of a more indefinite nature, 666, 994.
as to objects of benevolence and liberality, *ib.*
such benevolent purposes as testator's executors should agree on, 667.
to executors to be given in *private* charity, 668.
charitable or other purposes as trustees should think fit, *ib.*
bequest of what shall remain or be left at prior legatee's death void for, 669.

UNCERTAINTY (*continued*).
where the direction was to continue the testator's charities, *ib.*
on account of loose description of objects, 670.
where the court could not direct the execution of the trust, 678.
when trust will not be void for, 671.

UNIFORMITY,
effect of act of, in rendering office void, 720.

UNITARIANISM,
whether Court of Chancery will effect trusts for propagation of, 108.
Unitarians not objects of certain charities, *ib.*
trustees professing, will be removed from establishment for promoting doctrines of the trinity, 749 n. (*s*), 752, 761.

UNIVERSITIES OF OXFORD AND CAMBRIDGE,
the colleges in, are lay corporations, 23, 25.
colleges in, excepted from the statute of charitable uses, 817.
stat, 1 Edw. VI. c. 14, p. 95 n.
exception in favour of, in stat. 9 Geo. II. c. 36, pp. 247, 248.
acts appointing charity commissioners do not extend to, 306, 885.
restriction on number of advowsons to be held by colleges in, removed, 838.
subject to king's visitation, 333.

UNIVERSITY LIFE ASSURANCE SOCIETY,
enabled to purchase annuities for lives and to lend money or stock upon mortgage, 877.

USAGE,
old instruments may be construed with reference to, 562—567.

W.

WATERWORKS,
devise for making, a charitable use, 75.
acts of parliament for supporting, may create a charitable use, *semble*, 81.

WESTMINSTER COLLEGE,
proviso in favour of, in stat. 9 Geo. II. c. 36, s. 4, as to disposition of lands to, 826.
excepted from statute of charitable uses, 817.
powers of charity commissioners, 885.

WILLS,
not revoked by conveyance to charitable uses which fails by death of grantor, 131.
generally revoked by imperfect conveyances, *ib.* n. (*m*).
executed before stat. 9 Geo. II. c. 36, by testators who died after, valid, 138. *See* BEQUEST, DEVISE.

WINCHESTER COLLEGE,
proviso in favour of, in stat. 9 Geo. II. c. 36, s. 4, as to disposition of lands to, 826.
excepted from statute of charitable uses, 817.
powers of charity commissioners, 885.
reference to case of appeal to visitor of, 375, n. (*x*).
complaint against wardens and master of, entertained by House of Lords, 377, n. (*b*).

WINDOW TAX,
hospitals, charity schools, and houses for reception of poor persons exempted from, 789.

WORKHOUSES,
corporations of, in London, Middlesex, and Surrey enabled to hold lands in mortmain, 49.
visitors and guardians of the poor of parishes incorporated enabled to hold a limited quantity of land, 50.
appointment of governor of, when void, 50.
powers of purchasing lands for, extended to the poor law commissioners, *ib.*
act for facilitating the conveyances of, 985.

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